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IN THE

Supreme Court of the United States

October Term, 1990

GIUSEPPE GAMBINO a/k/a "Joe" and
MATTEO ROMANO,

Petitioners,

-against-

UNITED STATES OF AMERICA,

Respondent.

JOINT PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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On the Petition
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QUESTIONS PRESENTED

1. Whether collateral estoppel bars prosecution of a defendant for CCE and RICO violations when the government proposes to offer evidence of a crime of which he was previously acquitted to prove one or more of their elements?

2. Whether this Court's interpretation of the Double Jeopardy Clause of the Fifth Amendment announced in *Grady v. Corbin*, _____ U.S. _____, 110 S.Ct. 2084 (1990), bars prosecution of RICO and CCE offenses when elements thereof may be proved by evidence which was the subject of a prior prosecution which resulted in an acquittal?

3. Whether the Double Jeopardy Clause bars prosecution of a CCE offense when one of its predicate offenses is a lesser included conspiracy of which the defendant was previously acquitted?

4. Whether the Double Jeopardy Clause is offended by the reprosecution of a defendant for a RICO conspiracy which is the same conspiracy of which he was previously acquitted?

LIST OF PARTIES

Petitioners Giuseppe Gambino and Matteo Romano were defendants-appellants below. The United States of America was plaintiff-appellee.

Petitioners Gambino and Romano are filing a joint petition for a writ of certiorari. The government sought and received an adjournment in the time to file its petition for a writ of certiorari until July 2, 1991.

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IN THE

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October Term, 1990

GIUSEPPE GAMBINO a/k/a "Joe" and
MATTEO ROMANO,

Petitioners,

-against-

UNITED STATES OF AMERICA,

Respondent.

JOINT PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners Giuseppe Gambino and Matteo Romano respectfully pray that a writ of certiorari issue to review, on Double Jeopardy grounds, the judgment of the United States Court of Appeals for the Second Circuit affirming the order of the United States District Court for the Southern District of New York which denied their motions to dismiss.

OPINIONS BELOW

The opinion of the Court of Appeals appears in the appendix hereto at pp. 1a-16a. The opinion of the District Court appears in the appendix hereto at pp. 19a-66a.

JURISDICTION

The judgment of the United States Court of Appeals for the Second Circuit was entered on December 10, 1990, App. A at 1a; rehearing was denied on February 1, 1991, App. B at 17a-18a. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS AND RULES

The Fifth Amendment to the United States Constitution provides, in pertinent part:

> No person shall ... be subject for the same offense to be twice put in jeopardy of life or limb ....

21 U.S.C. § 848(c) provides, in pertinent part:

> [A] person is engaged in a continuing criminal enterprise if--
>
> (1) he violates any provision of this subchapter or subchapter II of this chapter the punishment for which is a felony, and
>
> (2) such violation is a part of a continuing series of violations of this subchapter or subchapter II of this chapter--
>
> (A) which are undertaken by such person in concert with five or more other persons with respect to whom such person occupies a position of organizer, a supervisory position, or any other position of management, and
>
> (B) from which such person obtains substantial income or resources.

18 U.S.C. 1962 provides:

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section.

STATEMENT OF THE CASE

A. Petitioner Gambino

Petitioner Gambino was charged in six counts of a sixth superseding indictment [6S 88 CR 919 (PKL)] which alleged, *inter alia,* various violations of the narcotics laws. Count One charged that Gambino participated in a conspiracy to import narcotics in violation of 21 U.S.C. § 963. Count Two charged that the same activities underlying Count One also amounted to a conspiracy to possess narcotics with an intent to distribute them in violation of 21 U.S.C. § 846. Count Three, which incorporated Counts One and Two, alleged that Gambino engaged in a continuing criminal narcotics enterprise ("CCE") in violation of 21 U.S.C. §§ 848(a) and (b). Count Five alleged that petitioner participated in a March 15, 1988 sale of heroin in violation of 21 U.S.C. §§ 841(a)(1) and (2). Count Six charged that he obstructed justice in connection with the testimony of former co-defendant, Giovanni Zarbano, in violation of 18 U.S.C. § 1503. And finally, Count Seven alleged that these crimes, together with Travel Act violations, bribery, loansharking, extortion, gambling, and murder, constitute a pattern of racketeering activity in violation of 18 U.S.C. § 1962 ("RICO").

Prior to trial, petitioner moved to dismiss the first three counts of the indictment and to bar proof that he participated in a 1980 plan to import and distribute heroin from Milan, Italy (27a-39a).[1] Though the District Court (Leisure, J.) granted Gambino's motion to bar proof that he conspired to import heroin in 1980, it denied the defendant's motion in all other respects (35a-37a). The petitioner, pursuant to *Abney v. United States,* 431 U.S.

1. References in parentheses followed by "a" refer to the pages in petitioners' joint appendix.

651, 97 S.Ct. 2034 (1977), appealed to the United States Court of Appeals for the Second Circuit.

On December 10, 1990, a panel of the Second Circuit held that *Grady v. Corbin,* ___ U.S. ___, 110 S.Ct. 2084 (1990), and the double jeopardy provisions of the Fifth Amendment of the Constitution barred prosecution of Gambino on Counts One and Two but not on Counts Three (CCE) and Seven (RICO). The court directed that "upon remand, the District Court shall consider whether to dismiss, with leave to re-present Counts One and Two of the indictment or to order redaction of the offending portions of the indictment." *United States v. Gambino,* 920 F.2d 1108, 1114 (2d Cir. 1990); (16a).

Petitioner Gambino sought rehearing *en banc* solely with regard to the court's decision permitting prosecution of him on Count Three and the admission of evidence of the 1980 importation on Counts Three and Seven. The government filed a cross petition, challenging the court's conclusion that considerations of prior jeopardy compelled the dismissal or re-presentation of Counts One and Two. The cross petitions were denied (17a-18a).

In *Gambino,* 920 F.2d at 112, the Second Circuit decided that, "[w]hile *Grady* announces a significant change in our approach to most successive prosecutions, we decline to read into *Grady* a disavowal of all prior double jeopardy precedent." Thus, relying on several of its pre-*Grady* decisions[2] and this Court's decision in *Garrett v. United States,* 471 U.S. 773, 105 S.Ct. 2407 (1985), which had held that facts underlying prior *convictions* can later

2. *United States v. Scarpa,* 913 F.2d 993 (2d Cir. 1990); *United States v. Persico,* 774 F.2d 30 (2d Cir. 1985); *United States v. Amen,* 831 F.2d 373 (2d Cir. 1987), *cert. denied,* 485 U.S. 1021 (1988).

be used to prove elements of CCE or RICO offenses, it concluded that Gambino's 1981 *acquittal* could be used by the government to prove essential elements of both the CCE and RICO crimes with which he is now charged. *id.* at 1112-14. Certiorari should be granted because this conclusion violates the holding of *Ashe v. Swenson,* 397 U.S. 436, 446, 90 S.Ct. 1189, 1195 (1970); *see also, Garrett,* at 798-99, 105 S.Ct. at 2421-22 (O'Connor, J., concurring).

Moreover, since the panel's decision in this case, the Court of Appeals for the Tenth Circuit decided *United States v. Felix,* 926 F.2d 1522, 1527-28 (10th Cir. 1991) which adopts the Second Circuit's approach, as announced in *United States v. Calderone,* 917 F.2d 717, 721 (2d Cir. 1990), that *Grady* "was intended to guide double jeopardy analysis in all cases involving successive prosecutions," and rejects the Third Circuit's conclusion that *Grady* does not apply to offenses charging multi-layered conduct because it "cannot easily be transposed to the RICO context[.]" *United States v. Pungitore,* 910 F.2d 1084, 1110 (3d Cir. 1990). As petitioner argued in suggesting that rehearing was required, the *Gambino* decision merely adds to the confusion since it seemingly rejects the reasoning in *Calderone* while apparently adopting the holding in *Pungitore. Compare United States v. Russo,* 906 F.2d 77 (2d Cir. 1990). That anomaly is only exacerbated by *Felix* which relies, in part, on *Calderone* as a basis for departing from *Pungitore.* This Court should grant certiorari to resolve the differing views of the circuits as to the applicability of *Grady* when the government proposes to use evidence of a crime of which a defendant has been previously acquitted to prove elements of subsequently charged CCE and RICO offenses.

Finally, Petitioner Gambino submits that the circuit court wrongly interpreted both *Grady* and *Garrett* when it refused to hold that double jeopardy bars prosecution of the CCE violation as charged, because one of its predicates is a lesser included offense of which the defendant was previously acquitted. Certiorari should also be granted to review this erroneous ruling.

B. Petitioner Romano

In an indictment returned on June 30, 1988, *United States v. Adamita,* SSS 88 CR 217 (JES) (S.D.N.Y.), Petitioner Matteo Romano and twenty-seven co-defendants were charged, in Count One, with participating in a wide-ranging, multi-drug conspiracy between January 1, 1985 and June 30, 1988. The indictment alleged, among other things, the importation of kilograms of heroin from Europe into the United States, sometimes in exchange for kilograms of cocaine; the distribution of kilograms of heroin and cocaine and multi-ton quantities of marijuana; the use of various businesses as fronts for illegal activities; and the use of weapons to protect the narcotics business.

A jury trial commenced on October 31, 1988, against 17 of the original 28 defendants, including Romano. At the close of the government's case, all remaining defendants moved for judgments of acquittal pursuant to Fed.R.Crim.P. 29. While Romano's motion was denied (the district court granted seven of the motions), the *Adamita* jury, after deliberation, acquitted him and one other defendant.

On December 1, 1988, while the *Adamita* trial was in progress, Petitioners Romano and Gambino, two co-defendants from the *Adamita* indictment and twelve others were arrested, and, in the indictment at issue, charged

with the identical, wide-ranging, multi-drug conspiracy, this time spanning from January 1, 1975, to the filing of the indictment on December 14, 1988. The conspiracy was alleged variously as a conspiracy to import and distribute narcotics, Counts One and Two, and as a RICO conspiracy, Count Seven. *United States v. Gambino,* SSSSSS 88 CR 919 (PKL).

Accordingly, Petitioner Romano moved pre-trial to dismiss the charges against him on the grounds that the prosecution violated his rights to protection against having been placed twice in jeopardy for the same crime. The district court denied his motion and petitioner appealed to the Second Circuit. There he argued that comparing the narcotics conspiracy counts in each indictment, including the charges, alleged participants, time spans, operations, commonality of overt acts, geographic scope, objectives, and degree of interdependence of each alleged conspiracy, *United States v. Korfant,* 771 F.2d 660, 662 (2d Cir. 1985), established that the three conspiracies were, in fact, one and the same. Petitioner Romano further contended that since the RICO conspiracy, charged in Count Seven, was merely the identical narcotics conspiracy realleged as a violation of the RICO statute, it too should be dismissed. While the appeal was pending, the government withdrew the conspiracies charged in Counts One and Two and filed a *nolle prosequi* on those counts, thereby arguably conceding the identity of the narcotics conspiracies charged in the successive indictments.

Thereafter, the Second Circuit denied Petitioner Romano double jeopardy relief as to Count Seven, relying on the fact that the narcotics conspiracy was charged under RICO, a "compound-complex" felony. *United States v. Gambino,* 920 F.2d at 1113. It decided that this Court's

holding in *Grady v. Corbin* should not apply, and that *Garrett v. United States* should instead control, stating, "that, if the government shows conduct subsequent to a prosecution, 'it does not violate the double jeopardy clause ... to prosecute the CCE[3] offense after prior conviction for one of the predicate offenses.'" 920 F.2d at 1113; *quoting Garrett* at 793, 105 S.Ct. at 2418.

Certainly, the rejection of the double jeopardy analysis in *Grady* in favor of the holding in *Garrett* as applied to "compound-complex felonies," given the current conflict in the circuits on this question, demands resolution by this Court. Further, the Second Circuit wholly disregarded an important factor about this case that distinguishes it from *Garrett* and also demands recognition by this Court -- that Petitioner Romano is being reprosecuted using conduct underlying offenses of which he was previously *acquitted.* Thus, the petitioner maintains that this Court should grant certiorari to determine whether this prosecution for conspiracy to violate RICO is barred by the previously unsuccessful prosecution of various alleged predicate acts.

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3. Notably, the Second Circuit's opinion uses the CCE and RICO statutes interchangeably for purposes of its analysis. *See Gambino*, 920 F.2d at 1112-3.

REASONS FOR GRANTING THE WRIT

I

Certiorari Should Be Granted to Determine Whether the Principles of Collateral Estoppel Announced in *Ashe v. Swenson,* 397 U.S. 436, 90 S.Ct. 1189 (1970), Require a Finding of Former Jeopardy When a Prior Acquittal Is Used to Establish an Element of a CCE or RICO Offense.

In *Ashe v. Swenson,* 397 U.S. 436, 445-46, 90 S.Ct. 1189, 1195 (1970), this Court held that collateral estoppel is "embodied in the Fifth Amendment guarantee against double jeopardy" and that "[it] surely protects a man who has been acquitted from having to 'run the gantlet' a second time, *quoting Green v. United States,* 355 U.S. 184, 190, 78 S.Ct. 221, 225 (1957)." Further, the Court (at 444, 90 S.Ct. at 1194) determined that:

> Where a previous judgment of acquittal was based upon a general verdict, as is usually the case, this approach requires a court to 'examine the record of a prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter, and conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration.' *quoting Sealfon v. United States,* 332 U.S. 575, 579, 68 S.Ct. 237, 240 (1948).

The application of such an approach here compels the conclusion that evidence of Petitioner Gambino's 1981 acquittal cannot be used to prove either the CCE (Count Three) or RICO (Count Seven) offenses charged in the

superseding indictment. As the court below properly found:

> The government's evidence in *Gambino I* [the 1981 case] consisted primarily of testimony from Frank Rolli, a government informant who allegedly conspired with Gambino and co-defendant Emanuele Adamita in the heroin importation scheme. Rolli testified that he met with Gambino and Adamita in Brooklyn on two occasions in March 1980; that the three men discussed a plan to smuggle heroin at Kennedy Airport; that Gambino agreed to pay him $30,000 for his assistance; that Rolli and Adamita travelled to Italy in order to obtain the heroin; and that, once in Italy, the amount of heroin to be imported increased from ten kilograms to forty kilograms. *Gambino,* 920 F.2d at 1109; (4a).

Under such circumstances, where there was direct testimony by a co-actor of the defendant's participation in an unlawful scheme, a jury's not guilty verdict can only be interpreted as a finding of non-participation (*see* 36a-37a). And it is crystal clear that it is precisely that same issue--petitioner's role in the 1980 heroin importation -- which the government seeks to relitigate in this case. It is also exactly this situation to which Justice O'Connor referred in her concurring opinion in *Garrett* when she observed:

> Any acquittal on a predicate offense would of course bar the Government from later attempting to relitigate issues in a prosecution under § 848. (citing *Ashe*) This fact will prevent the Government from 'treat[ing] the first trial as no more than a dry run for the second prosecu-

> tion. *quoting Ashe* at 447, 90 S.Ct. at 1196.' *Garrett* at 798-99, 105 S.Ct. at 2421-22.

Accordingly, this Court should grant certiorari to determine whether the Second Circuit properly applied the collateral estoppel principle announced in *Ashe* in this case.[4]

II

Certiorari Should Be Granted to Resolve a Split Among the Circuits As To the Applicability of *Grady* to Subsequent Prosecutions, Such As Under CCE and RICO, Charging Crimes Which Require Proof of "Multi-layered" Conduct.

Petitioners Gambino and Romano also submit that the circuit court improperly applied the holding in *Grady* to the facts in this case and in so doing contradicted the implicit prior holding of another panel of the Second Circuit and the Tenth Circuit's more recent decision in *United States v. Felix, supra.* Relying on the Third Circuit's decision in *United States v. Pungitore, supra,* the court below refused to apply *Grady,* a "single transaction" case, to these defendants' alleged "multi-layered conduct." *Gambino,* 920 F.2d at 1112-13; (13a). By contrast, the plurality of another panel of the Second Circuit indicated that *Grady* may be applicable to such "multi-layered" conduct which is often prosecuted as a RICO or CCE

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4. The government is not helped by this Court's recent decision in *Dowling v. United States,* _____ U.S. _____, 110 S.Ct. 668 (1990). In *Dowling,* the Court refused to apply *Ashe* to preclude *modus operandi* evidence adduced during a trial where there had been an acquittal because its admissibility at the later trial required a lesser standard of proof and the finding of the prior jury had not conclusively determined the issue sought to be relitigated in petitioner's favor. As we noted above, neither of those considerations applies here.

violation. *United States v. Calderone, supra* (Newman, J., concurring). Further, the Tenth Circuit, relying in part on *Calderone,* decided that "the 'same conduct' test announced in *Grady* applies to all double jeopardy claims arising in the context of successive prosecutions." *Felix* at 1528, *quoting Calderone* at 721. This Court should grant certiorari to resolve this apparent split among the circuits and to determine how *Grady* impacts upon the prosecution of so-called complex, multi-layered offenses.

In *Calderone,* Judge Newman pointedly cited the decisional gap that currently exists between the analysis of successive prosecutions of offenses arising from a single transaction *(Grady)* as opposed to those implicating continuing criminal conduct *(Garrett)* and concluded that since *Grady* is the most recent case, its broader strictures should apply. *Calderone* at 723. Judge Newman then noted that the "correct view" of *Grady*'s reference to "conduct that constitutes an offense for which the defendant has already been previously prosecuted" includes conduct which "may be only the entirety of an element of the prior offense." He therefore concluded (*Calderone* at 725) that:

> I read *Grady* to bar a second prosecution whenever the defendant is at risk that the entirety of an element of an offense in a pending prosecution might be established by conduct constituting the entirety of a previously prosecuted offense (as in *Grady*), or the entirety of an element of such an offense, or the entirety of a distinct component of such an offense (as in *Russo*).

Applying Judge Newman's reasoning to the facts here, one must conclude that *Grady* bars prosecution of the § 848 and RICO violations charged in this case since it is clear

that the offenses of which both Gambino and Romano were previously acquitted included "conduct" which would be used to establish either "the entirety of an element" or "a distinct component" of the pending "complex" offenses.

Thus, for example, Gambino's acquittal was of an offense which involved the concerted action of more than five individuals supervised by Gambino to import into the United States more than 40 kilograms of heroin worth millions of dollars. This conduct amply proves all or part of several of the elements of a § 848 offense; *e.g.*, it establishes the requisite series of felony violations of the narcotics laws, the more than five persons element, the supervision element, and the substantial income or resources element. As to Romano, proof of the § 846 narcotics conspiracy of which he was previously acquitted will be essential in proving the RICO narcotics conspiracy. It is, therefore, petitioners' position that the holding in *Grady* does apply and that, together with the double jeopardy clause of the Fifth Amendment, it bars prosecution of the defendants on both the § 848 and RICO counts.

In *Grady,* the Court held that the "Double Jeopardy Clause bars *any* subsequent prosecution in which the government, to establish an essential element of an offense charged in that prosecution, will prove conduct that constitutes an offense for which the defendant has already been prosecuted (emphasis added)." *Grady* at 2093. If the lower court's decision stands, the government, under the indictment as presently pleaded, will seek to prove that the conduct of defendant Gambino in connection with the alleged importation in 1980 establishes at least some of the essential elements or "components" of a CCE offense. *See United States v. Sperling,* 506 F.2d 1323 (2d Cir. 1974),

cert. denied, 420 U.S. 962, 95 S.Ct. 1351 (1975); *United States v. Amen, supra.*[5] Mr. Romano's RICO conspiracy will in turn be established using predicate/overt acts either known to the government or already litigated in the *Adamita* case.

We submit that such a prosecution clearly contravenes the explicit holding in *Grady* and is at odds with the rationale of *Calderone. See also, Russo, supra.* Finally, in addition to the fact that *Gambino* and *Calderone* are internally inconsistent, the *Gambino* holding contradicts *Felix* by adopting the Third Circuit's approach in *Pungitore.* This Court should grant certiorari to resolve this conflict and insure uniform application of the double jeopardy principle enunciated in *Grady.* Indeed, the importance of such review is evident given the number of cases which have arisen and the differing conclusions reached in the relatively short period of time since *Grady* was decided.

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5. Obviously, nothing prevents the prosecution from presenting Gambino's case to an untainted grand jury with no reference to the facts underlying the petitioner's 1981 acquittal. Then if, as the lower court suggests, there is sufficient subsequent conduct to establish each of the necessary elements, the petitioner's double jeopardy rights will be preserved and the government's interests in prosecuting will be sustained. On the other hand, if the government fails to convince the grand jury, without the petitioner's 1981 acquittal, that it can prove each of the essential elements of the crimes charged, only the untainted narcotics and other criminal charges would remain.

III

Certiorari Should Be Granted to Determine Whether *Grady* and *Garrett* Preclude Prosecution of Petitioner Gambino for a CCE Offense After He Had Been Acquitted of a Lesser Included Predicate Offense.

This Court should grant certiorari to review the lower court's determination that the double jeopardy clause does not bar prosecution of Count Three of the indictment which charges that Gambino participated in a continuing criminal enterprise in violation of 21 U.S.C. § 848. The panel held that although prosecution of the two conspiracies underlying the § 848 count is barred by the double jeopardy clause, proof of them may be used to establish a number of the essential elements of the § 848 charge. This erroneous conclusion requires review.

Petitioner's position is based on the premise that since a conspiracy to violate the narcotics laws is a lesser included offense of a continuing criminal enterprise, *United States v. Benevento,* 836 F.2d 60, 73 (2d Cir. 1987), the double jeopardy clause bars a subsequent § 848 prosecution when one of its predicate offenses is a conspiracy of which the defendant has been previously tried and acquitted. *Brown v. Ohio,* 432 U.S. 161, 97 S.Ct. 2221 (1977).

In making this claim, we rely in part on *United States v. Roman,* 646 F.Supp. 1568 (S.D.N.Y. 1986), *rev'd. on other grounds,* 822 F.2d 261 (2d Cir.), *cert. denied,* 484 U.S. 954 (1987). In *Roman,* the court dismissed a continuing criminal enterprise charge on speedy trial grounds, holding that the speedy trial clock had begun to run upon the return of the underlying narcotics conspiracy charge, rather than from the date of the superseding

indictment charging a continuing criminal enterprise. The court determined that the applicable inquiry was whether the conspiracy and the continuing criminal enterprise charges were the "same offense" for double jeopardy purposes, and then found that "for the purpose of the double jeopardy protection against multiple prosecutions, the CCE charge must be considered the same as the conspiracy charge." 646 F.Supp. at 1572.

Roman was later strengthened by the Third Circuit in *United States v. Aguilar,* 849 F.2d 92 (3d Cir. 1988). In *Aguilar,* the defendant had been convicted of participating in a cocaine conspiracy charged in a 1985 indictment. Approximately one year later, another indictment was returned in which the defendant was charged with participating in a second cocaine conspiracy and with violating § 848. The trial court dismissed the second conspiracy charge on the ground that it was in fact the same conspiracy alleged in the first indictment, but refused to dismiss the § 848 count. The Third Circuit reversed, agreeing with the defendant's claim that "CCE consists of 'conspiracy plus,' which makes CCE and conspiracy the same offense ... and, under *Brown,* bars [a] subsequent prosecution for the greater offense." *Aguilar,* 849 F.2d at 97.

The applicability of *Roman* and *Aguilar* to the facts here is obvious. In previously trying Gambino for the same conspiracy that is alleged in Count One of this indictment, the government lost its right to now prosecute him on a charge of a continuing criminal enterprise encompassing that conspiracy. Significantly, the trial court did not disagree. Rather, it stated, "As the Court did not decide to dismiss either of the first two counts on double jeopardy grounds, Gambino's motion to dismiss the third

count on those grounds must fail." (39a). *A fortiori*, since the circuit court decided that the trial court had erred in declining to dismiss Counts One and Two, its decision to let the CCE count stand must be erroneous. *See Garrett* at 797-798, 105 S.Ct. at 2421 (O'Connor, J., concurring).[6]

Moreover, reliance on the majority opinion in *Garrett* is unavailing. Here, the double jeopardy-barred conspiracies, which are the § 848 predicates, are also lesser included offenses, while the prior charge in *Garrett* was a *substantive*, and thus not a lesser included, offense. Therefore, the *Aguilar* court held:

> What distinguishes *Garrett* from this appeal, however, is the pivotal fact that the predicate offenses at issue were substantive, not conspiracy crimes.... *Garrett* was not, in other words, a prosecution where conspiracy was charged twice.... 849 F.2d at 99 n.12 (emphasis in original).

The circuit court's opinion which rejected this argument is, we respectfully submit, incorrect. First, as we argue above, it misapplies the teaching of *Garrett* and its Second Circuit progeny to this case.[7] Second, it improperly refuses to apply the holding in *Grady* to CCE and RICO

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6. It is, of course, no answer to suggest that there are other predicates described in the indictment which could support the § 848 count because there is no way to discern what portion of each of the essential elements was supplied by a double jeopardy barred predicate. *See Calderone; United States v. Garcia*, 907 F.2d 380, 381 (2d Cir. 1990); *United States v. Lopez*, 803 F.2d 969, 975 (9th Cir. 1986); *United States v. Ruggiero*, 726 F.2d 913, 921-23 (2d Cir.), *cert. denied*, 469 U.S. 831, 105 S.Ct. 118 (1984).

7. *United States v. Persico*, 774 F.2d 30, 32 (2d Cir. 1985); *United States v. Amen*, 831 F.2d 373, 381 (2d Cir. 1987).

prosecutions where a defendant has been acquitted of acts which are later charged as predicates. In that regard, the central premise of the court's decision is that *Garrett* held "that, if the government shows conduct subsequent to a prosecution 'it does not violate the Double Jeopardy Clause ... to prosecute the CCE offense after a prior *conviction* for one of the predicate offenses (emphasis added)'" *Gambino* at 793, *quoting Garrett* at 793, 105 S.Ct. at 2418. However, this analysis does not pass muster where, as here, the defendant was acquitted of the underlying offense.

Similarly, this case is not like *Brown v. Ohio,* 432 U.S. 161, 169, 97 S.Ct. 2221, 2227 (1977) and its antecedents, where the Court suspended its traditional double jeopardy analysis to allow a subsequent prosecution when the State was unable to proceed on the more serious charge at the outset because additional facts necessary to sustain the later charge had not occurred or had not been discovered, despite the exercise of due diligence. *Diaz v. United States,* 223 U.S. 442, 32 S.Ct. 250 (1912). Here, the prosecution knew that the defendant had been acquitted of one of the predicate acts long before the filing of the sixth superseding indictment. Thus, while we agree that the government need not wait for a completed series of acts before indicting or prosecuting an individual for one of them, when it does seek to prosecute such a series at a given time, it must use only elements that are not constitutionally or statutorily barred. Because the lower court's decision abrogates these central tenets of double jeopardy analysis, certiorari should be granted.

IV

Certiorari Should Be Granted Because, Under the Holdings of Either *Grady* or *Garrett,* the Second Circuit Improperly Deprived Petitioner Romano, a Previously Acquitted Defendant, of Double Jeopardy Protection.

A. The Particular Significance That the Law Attaches to an Acquittal Was Overlooked By the Court Below.

Assuming *arguendo* that the double jeopardy analysis in *Garrett v. United States,* focusing upon "compound-complex felonies," survives the Court's recent ruling in *Grady v. Corbin,* the Court of Appeals' decision to deny Petitioner Romano constitutional protection from reprosecution must be scrutinized by this Court for yet another reason: the defendant was acquitted of the conduct prosecuted in the first case. Such a significant factor, which distinguishes this from most double jeopardy cases, demands special attention if the Court is to complete the careful recontouring of the double jeopardy landscape that began with *Grady.*

An acquittal has traditionally been given particular consideration in the Court's double jeopardy decisions. *See United States v. DiFrancesco,* 449 U.S. 117, 101 S.Ct. 426, 433 (1980); *United States v. Scott,* 437 U.S. 82, 98 S.Ct. 2187, 2193 (1978); *United States v. Martin Linen Supply Co.,* 430 U.S. 564, 97 S.Ct. 1349, 1354 (1977). As noted by Justice O'Connor in her concurring opinion in *Garrett:*

> '[T]he State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and

> compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent, he may be found guilty.'

Garrett at 795-96, 105 S.Ct. at 2420 (O'Connor, J., concurring), *quoting Green* at 187-88, 78 S.Ct. at 223-24.

In the case at hand, the Court of Appeals, relying on the reasoning in *Garrett,* sanctioned the second prosecution of Petitioner Romano for conduct (a narcotics conspiracy) for which he had already been prosecuted -- *first,* because the reprosecution is being pursued under a different statute (but see POINT II, *supra*) and *second,* because the new indictment alleges that Romano committed criminal acts subsequent to and continuing beyond his first indictment. The existence of these "subsequent acts" was the operative factor in the Second Circuit's analysis of Romano's case in *Gambino.* As Justice O'Connor's concurrence in *Garrett,* referred to by the court below, *Gambino,* 920 F.2d at 1113, clearly explains:

> Where the defendant *continues* unlawful conduct after the time the government prosecutes him for a predicate offense, I do not think he can later contend that the government is foreclosed from using that offense in another prosecution to prove the continuing violation of § 848. (citations omitted). As the Court noted in another context, 'the Double Jeopardy Clause, which guards against government oppression, does not relieve a defendant from the consequences of his voluntary choice.' (citations omitted).

* * *

> Certainly the defendant's interest in finality would be more compelling where there is no indication of *continuing* wrongdoing after the first prosecution (emphasis supplied).

Garrett at 798-99, 105 S.Ct. at 2421-22 (O'Connor, J., concurring).

The *Garrett* decision was in turn based on the analysis in *Diaz, supra,* in which a prosecution for homicide after an initial conviction for assault and battery was permitted because "'[a]t the time of the trial for the [assault and battery] the death had not ensued, and not until it did ensue was the homicide committed. Then and not before, was it possible to put the accused in jeopardy for that offense.'" *Garrett* at 791, 105 S.Ct. at 2417-18, *quoting Diaz* at 448-49, 32 S.Ct. at 251. Because the continuing criminal enterprise at issue in *Garrett* was not completed at the time Garrett was indicted in the second case, it was, under *Diaz,* a different offense for double jeopardy purposes. *Garrett* at 791-92, 105 S.Ct. at 2418.

Critically here, that pivotal factor -- *continuing* criminal conduct -- is missing. A continuation presumes that initial criminal activity first occurred. Yet, Romano's *acquittal* negates this presumption. Thus, while this defendant is indeed charged with acts subsequent to his first indictment, the verdict there of "not guilty" tells us that any criminal acts allegedly committed after the first prosecution did not *continue* the conduct charged in the first prosecution and cannot be used to justify an indictment consisting of predicate acts which are no longer attributable to him. If the government wishes to prosecute those subsequent acts, it must charge them separately and not utilize them as an excuse to reallege conduct

as part of a multi-layered conspiracy charge which was the subject of a prior acquittal.[8]

This case is a paradigm of a defendant being exposed to the government's attempt to "'[treat] the first trial as no more than a dry run for the second prosecution.'" *Garrett* at 799, 105 S.Ct. at 2422 (O'Connor, J., concurring), *quoting Ashe* at 447, 90 S.Ct. at 1196. The government tried Romano on a straight § 846 narcotics conspiracy and lost. After effectively using the jury system to thwart the powers of the government by proving he was not a part of the narcotics conspiracy, he has been re-indicted for the same conspiracy, only this time rewrapped in the RICO conspiracy statute. He is forced now to defend another formidable charge in a separate proceeding. This Court warned against this precise situation in *United States v. Scott, supra:*

> To permit a second trial after an acquittal, however mistaken the acquittal may have been, would present an unacceptably high risk that the government, with its vastly superior resources, might wear down the defendant so that 'even though innocent, he may be found guilty.'

Scott at 91, 98 S.Ct. at 2194, *quoting Green* at 188, 78 S.Ct. at 223. Thus, this petitioner is exposed to a situation which is not only fundamentally unfair, but a dangerous example of the manipulative and oppressive capabilities of the government.

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8. Precisely the same reasoning applies to the government's attempt to relitigate Gambino's 1981 acquittal as one of the RICO predicates. Moreover, in *United States v. Russo, supra,* the government conceded that the Double Jeopardy Clause bars it from re-using acts which were the subject of prior acquittals as RICO predicates.

This Court should review this case in order that its admonitions are appropriately followed, specifically, that "[a]ny *acquittal* on a predicate offense would of course bar the Government from later attempting to relitigate issues in a prosecution under § 848 (emphasis added)." *Garrett* at 798, 105 S.Ct. at 2421 (O'Connor, J., concurring) (citation omitted). Since *Garrett* made clear that a previous acquittal cannot be used, even in a subsequent "complex" prosecution and not-withstanding alleged subsequent acts, without violating the strictures of the Fifth Amendment, the RICO charge against Petitioner Romano must be dismissed.

B. The "Subsequent Acts" At Issue Exist Only Through the Inventive Wording in the Government's Indictment.

Petitioner Romano's alleged "subsequent acts," noted by the Second Circuit and used to justify the denial of double jeopardy relief, are, upon closer scrutiny, wholly illusory. They consist of participating in an extortionate credit conspiracy, using the telephone to facilitate narcotics trafficking, and continuing to import and distribute narcotics. *United States v. Gambino,* 920 F.2d at 1113; (15a). However, the noted post-indictment conduct actually refers to otherwise innocent telephone calls and a meeting between the defendant and several co-defendants. The charge of extortionate extension of credit spans the life of the indictment, from 1975 to 1988, and includes eight co-defendants. The allegation that he continued to conspire to import and distribute narcotics is based simply on his general presence in the indictment.

At bottom, there is no allegation that Romano committed a *criminal act* after his first indictment. Instead,

this second indictment is artfully drafted using broad generalizations and charges that sweep through it without actually accusing Romano of a single criminal act during the six-month period between the first indictment and the second. Surely, such allegations cannot be the sole basis to force this petitioner yet again to trial on a narcotics conspiracy of which he has already been found not guilty.

CONCLUSION

The petitions for a writ of certiorari should be granted.

Dated: New York, New York
May 2, 1991

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APPENDICES

Appendix A
Opinion of United States Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 1344, 1345 - Dockets 90-1104, 90-1106

Argued May 7, 1990 - Decided December 10, 1990

UNITED STATES OF AMERICA,
Appellee,

v.

GIUSEPPE GAMBINO a/k/a "Joe,"
and MATTEO ROMANO,
Defendants-Appellants.

Before:
ALTIMARI and MAHONEY, *Circuit Judges,* and
POLLACK,* *Senior District Judge.*

Defendants were charged with conspiracy to import heroin and cocaine, conspiracy to distribute heroin and cocaine, continuing criminal enterprise, and conspiracy to violate RICO after one was acquitted of conspiracy to import heroin and the other of conspiracy to import and distribute heroin and cocaine. Defendants moved to dismiss indictment. The United States District

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* The Honorable Milton Pollack, United States District Court for the Southern District of New York, sitting by designation.

Appendix A
Opinion of United States Court of Appeals

Court for the Southern District of New York, Peter K. Leisure, J., denied defendants' motion, 729 F.Supp. 954. Defendants appealed. The Court of Appeals, Altimari, Circuit Judge, held that: (1) narcotics conspiracy counts were barred by double jeopardy, and (2) continuing criminal enterprise and RICO counts were not barred by double jeopardy.

Affirmed in part, reversed in part, and remanded.

Judd Burstein, New York City (Wendy A. Rothstein, New York City, of counsel) for defendant-appellant Gambino.

Gerald L. Shargel, New York City (Gail E. Laser, New York City, of counsel) for defendant-appellant Romano.

Andrew C. McCarthy, Asst. U.S. Atty., New York City (Otto G. Obermaier, U.S. Atty., S.D.N.Y., Frances M. Fragos and Helen Gred, Asst. U.S. Attys., New York City, of counsel) for appellee.

ALTIMARI, Circuit Judge:

Giuseppe Gambino and Matteo Romano appeal from an order, entered in the United States District Court for the Southern District of New York (Peter K. Leisure, *Judge*), denying their motions to dismiss a sixth superceding indictment; SSSSSS 88 Cr. 919 (PKL), which charges them with conspiracy to import heroin

and cocaine and conspiracy to distribute heroin and cocaine. 729 F.Supp. 954. The indictment also charges Gambino with conducting a continuing criminal enterprise ("CCE"), and charges both Gambino and Romano with conspiracy to violate the Racketeer Influenced and Corrupt Organizations Act ("RICO"). In previous prosecutions, Gambino and Romano were acquitted of conspiracy to import heroin and of conspiracy to import and distribute heroin and cocaine, respectively. According to Gambino and Romano, prosecution under the sixth superceding indictment is barred by double jeopardy principles. For the reasons set forth below, the order of the district court is affirmed, in part, reversed, in part, and remanded for the district court's consideration of whether to dismiss, with leave to re-present, Counts One and Two of the indictment against Gambino or to order redaction of the offending portions of the indictment. We affirm the court's order in all other respects.

BACKGROUND

A. Gambino I.

In 1981, Gambino was acquitted by a jury of charges that he conspired, between August 1, 1979 and March 18, 1980, to import heroin to the United States. *United States v. Gambino,* 80 Cr. 131 (E.D.N.Y.) (Neaher, J.) ("*Gambino I*"). In *Gambino I*, the government alleged that defendant Gambino supervised and financed a conspiracy to import in excess of forty kilograms of heroin from Italy to the United States. At

trial, the government focused on a fifteen-day period, from March 3, 1980 to March 18, 1980, during which Gambino and his co-conspirators allegedly planned an ultimately unsuccessful trip to Italy for that purpose.

The government's evidence in *Gambino I* consisted primarily of testimony from Frank Rolli, a government informant who allegedly conspired with Gambino and co-defendant Emanuele Adamita in the heroin importation scheme. Rolli testified that he met with Gambino and Adamita in Brooklyn on two occasions in March 1980; that the three men discussed a plan to smuggle heroin through customs at Kennedy Airport; that Gambino agreed to pay him $30,000 for his assistance; that Rolli and Adamita travelled to Italy in order to obtain the heroin; and that, once in Italy, the amount of heroin to be imported increased from ten kilograms to forty kilograms. This heroin was seized at Kennedy Airport and Gambino was subsequently arrested, prosecuted and acquitted.

B. Adamita.

In 1989, Romano was acquitted by a jury of charges that he conspired to import and distribute heroin and cocaine. *United States v. Adamita,* SSS 88 Cr. 217 (S.D.N.Y.) (Sprizzo, J.) ("*Adamita*"). The indictment in Adamita alleged that Romano, along with 26 co-defendants, conspired to import narcotics from Italy to various cities in the United States between January 1, 1985 and June 30, 1988. The indictment cited some 105 overt acts, including the use of couriers to transport cocaine to Italy in order to exchange the cocaine for

heroin and return the heroin to the United States. The indictment also alleged that legitimate businesses, including pizza parlors and a clothing store, were used as fronts to distribute the narcotics. Romano was named in four of the indictment's overt acts, including several meetings with co-defendant Adamita. Romano was eventually tried, along with thirteen co-defendants, and was acquitted.

C. The present indictment.

On December 14, 1989, the Grand Jury returned a sixth superceding indictment, SSSSSS 88 Cr. 919, charging seven counts against some fifteen defendants, including Gambino and Romano. The indictment alleged a large-scale narcotics conspiracy, spanning almost fifteen years, and involving an international organization known as "the Mafia" or "La Cosa Nostra." Originally, both Gambino and Romano were named in Counts One and Two of the indictment. However, during the pendency of this appeal, the government determined not to pursue its prosecution on Counts One and Two against Romano. The government filed a motion, which was granted, to remand those counts to enable it to file a *nolle prosequi* as to Romano. This *nolle prosequi* will also result in the deletion of Romano's name from the corresponding RICO predicate acts.

Count One of the sixth superceding indictment charges that, between January 1, 1975 and the date the indictment was filed, the defendants participated in a conspiracy to import heroin and cocaine into the United States, in violation of 21 U.S.C. § 963 (1988). This

conspiracy allegedly involved the international smuggling, as well as primary and secondary wholesale distribution, of narcotics. Count One enumerates 172 overt acts, including specific narcotics transactions, meetings, and communications between defendants and their co-conspirators. Gambino is named in more than forty of those overt acts, including two overt acts related to his participation in the March 1980 heroin importation scheme. In a seventh superceding indictment, filed shortly before the district court rendered its decision on the underlying motion, the government alleged eleven additional overt acts, all of which name Gambino.

Count Two of the indictment alleges that the defendants conspired to distribute or to possess with intent to distribute heroin and cocaine, in violation of 21 U.S.C. § 846 (1988). This count incorporates the overt acts alleged in Count One.

Defendant Gambino is charged in Count Three of the indictment with organizing and supervising a CCE, in violation of 21 U.S.C. §§ 848(a) & (b) (1988). This count incorporates the violations alleged in Counts One ana Two and alleges that Gambino supervised the CCE from January 1, 1975 to the date of the indictment.

Count Seven of the indictment charges that Gambino and Romano, along with their co-defendants, conspired to conduct a racketeering enterprise, in violation of RICO, 18 U.S.C. § 1962(d) (1988). Count Seven alleges a pattern of racketeering activity consisting of forty-two predicate acts, including narcotics transactions, bribery, extortion, gambling, murder, and obstruction of justice, occurring between January 1, 1970 and the date of the indictment. The predicate acts in

which Gambino and Romano are both named include: possessing more than 500 grams of cocaine with intent to distribute on or about June 29, 1987; bribing a public official in February 1987 in order to facilitate the escape from federal custody of a co-defendant; travelling interstate in March 1987 in aid of racketeering activities; conspiring to make extortionate extensions of credit from January 1, 1975 to September 1, 1989; and conspiring during the same time period to use extortionate means to collect extensions of credit. In the seventh superceding indictment, the government alleged five additional predicate acts to support the racketeering conspiracy alleged in Count Seven.

D. The motion to dismiss.

On September 29, 1989, Gambino and Romano each moved to dismiss various counts of the sixth superceding indictment on the ground that prosecution on those counts violates the double jeopardy clause of the fifth amendment. According to Gambino, the overt acts alleged in the Count One importation conspiracy reflect conduct for which he was prosecuted in *Gambino I.* Further, Gambino argued that his prosecution for the Count Two distribution conspiracy is barred under the collateral estoppel principle. Gambino also argued that the Count Three continuing criminal enterprise charge is a lesser included offense of Counts One and Two and, therefore, should be dismissed. Finally, Gambino contended, in the alternative, that the government should be collaterally estopped from introducing any

evidence of the March 1980 attempted importation of heroin since he was acquitted of that offense.

According to Romano, his prosecution for Counts One, Two and Seven of the sixth superceding indictment is barred by his acquittal in *Adamita*. His challenge to the prosecution of Counts One and Two is rendered moot by the government's decision to file a *nolle prosequi* on those counts. However, Romano maintains his argument that the prosecution for conspiracy to violate RICO (Count Seven) is barred by the previous prosecution of various alleged predicate acts.

In response to Gambino's motion, the government argued that *Gambino I* concerned a single, fifteen-day narcotics conspiracy, while Counts One and Two of the sixth superceding indictment allege an extensive narcotics conspiracy spanning nearly fifteen years. The government also contended that, since Count Two (conspiracy to distribute) and Count Three (CCE) are statutorily distinct offenses from the offense charged in *Gambino I,* double jeopardy does not bar prosecution on those counts. Finally, the government argued that Gambino had not met his burden of proving that his acquittal in *Gambino I* entailed a finding that he had no involvement in the March 1980 importation scheme. In support of these arguments, the government proffered much of the evidence that it intended to introduce at trial. It also summarized the evidence presented in *Gambino I* and submitted the available transcripts from that trial to the court.

With respect to Romano's challenge to Count Seven, the government argued that Romano could be prosecuted under RICO because he had never before

been charged with a RICO conspiracy, nor had he previously been charged with several of the alleged predicate acts.

On January 25, 1990, the district court issued an opinion and order denying the defendants' double jeopardy challenges to the indictment. The court conducted a thorough analysis of defendants' double jeopardy claims, applying the factors set forth in *United States v. Korfant,* 771 F.2d 660 (2d Cir. 1985) (per curiam). It concluded that, under *Korfant,* Gambino's prosecution on Count One was not barred by his acquittal in *Gambino I.* It further determined that Gambino could be prosecuted on Count Two since it alleged a statutory offense different from that alleged in *Gambino I.* Finally, since Gambino's challenge to Count Three rested on his attacks on Counts One and Two, the court rejected that challenge. The court did, however, partially grant Gambino's motion to preclude the introduction of evidence of his involvement in the March 1980 plan to import heroin. Finding that the jury's verdict in *Gambino I* reflected a judgment about the credibility of Frank Rolli's testimony, the court ruled that this evidence could not be introduced to establish the conspiracy to import narcotics alleged in Count One. Evidence of the March 1980 scheme remained admissible in the government's prosecution of the conspiracy to distribute narcotics charged in Count Two, however, because the factual issues raised by this charge differ from those raised by the importation conspiracy charged in *Gambino I.*

The district court denied Romano's motion to dismiss Count Seven, finding that it alleged significant

criminal activity for which he was not prosecuted in *Adamita.*

This appeal followed.

DISCUSSION

I. Counts One and Two.

In reaching its decision, the district court applied the principle that the successive prosecution of conspiracies is barred by double jeopardy if "the offenses charged [are] in fact and in law the same." *United States v. Armedo-Sarmiento,* 545 F.2d 785, 792 (2d Cir.1976), *cert. denied,* 430 U.S. 917, 97 S.Ct. 1330, 51 L.Ed.2d 595 (1977). Its determination was guided by the *Korfant* factors, which include:

> (1) the criminal offenses charged in successive indictments; (2) the overlap of participants; (3) the overlap of time; (4) similarity of operation; (5) the existence of common overt acts; (6) the geographic scope of the alleged conspiracies or location where overt acts occurred; (7) common objectives; and (8) the degree of interdependence between alleged distinct conspiracies.

Korfant 771 F.2d at 662; *see United States v. Reiter,* 848 F.2d 336, 340 (2d Cir 1988). Based on these factors, the court concluded that prosecution on Counts One and Two was not barred by the defendants' previous prosecutions.

[1] On May 29, 1990, some twenty-two days after this appeal was heard, the Supreme Court announced its

decision in *Grady v. Corbin,* ____ U.S. ____, 110 S.Ct. 2084, 109 L.Ed.2d 548 (1990). In *Grady*, the Court held that a state prosecution for vehicular homicide was barred by the defendant's previous misdemeanor convictions for driving while intoxicated and failing to keep right of the median--conduct specified in the homicide bill of particulars to establish the element of negligence or recklessness. *Id.* 110 S.Ct. at 2094. The Court noted, however, that the prosecution could have been permissible "if the bill of particulars revealed that the State would not rely on proving the conduct for which Corbin had already been convicted." *Id.*

Grady significantly altered the jurisprudential landscape of double jeopardy, supplementing the traditional inquiry required by *Blockburger v. United States,* 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932), and its progeny.[1] According to *Grady* "[T]he Double Jeopardy Clause bars a subsequent prosecution if, to establish an essential element of an offense charged in that prosecution, the government will prove conduct that constitutes an offense for which the defendant has already been prosecuted." *Grady,* 110 S.Ct. at 2087. The Court rejected a "same evidence" approach, *id.* at 2093 n. 12, and instead focused on the government's use of previously prosecuted conduct "to establish an essential element" of the offense charged in the second prosecution, *id.* at 2087.

This "same conduct" test applies equally to successive prosecutions in "single transaction" cases, such

1. At the Court's request, the parties submitted letter-briefs addressing the impact of *Grady* on the present case.

as *Grady* itself, and conspiracy cases. *United States v.Calderone,* 917 F.2d 717, 721 (2d Cir. 1990). In *Calderone,* a divided panel held that defendants' acquittal on charges of participating in a wide-ranging, multi-drug conspiracy barred a subsequent prosecution alleging a narrower, single-drug conspiracy. The Court reasoned that the "conduct that constitutes an offense" in a conspiracy prosecution is that conduct from which the jury may infer the existence of an agreement. *Id.* at 721. It concluded that "[u]nder *Grady,* this conduct may not be prosecuted a second time in order to establish an 'agreement' that differs from the first crime only in that the indictment happens to describe it differently." *Id.* at 721. Accordingly, the *Korfant* factors applied by the district court are inadequate to satisfy double jeopardy concerns after *Grady. Id.* at 721 ("To the extent that *Korfant* and our other opinions in this area conflict with *Grady,* they are no longer good law.").

[2] With these principles in mind, we believe it appropriate to vacate the district court's order and remand for the court's consideration of whether to dismiss, with leave to re-present, Counts One and Two of the indictment against Gambino or to order redaction of the offending portions of the indictment. Because these counts rest, at least partially, on overt acts for which Gambino has been previously prosecuted, they may not remain in the indictment against Gambino.

II. Counts Three and Seven.

[3] The infirmity of Counts One and Two does not extend to Counts Three and Seven. While *Grady*

announces a significant change in our approach to most successive prosecutions, we decline to read into *Grady* a disavowal of all prior double jeopardy precedent. Thus, our view on the propriety of proving previously prosecuted conduct as predicate acts in a subsequent CCE or RICO prosecution is unaltered. *See United States v. Scarpa,* 913 F.2d 993, 1014 n. 8 (2d Cir. 1990). The permissibility of such subsequent prosecutions, in cases involving alleged predicate acts occurring after the initial prosecution, is well-established in this Circuit. *See United States v. Persico,* 774 F.2d 30, 32 (2d Cir.1985); *United States v. Amen,* 831 F.2d 373, 381 (2d Cir. 1987), *cert. denied,* 485 U.S. 1021, 108 S.Ct. 1573, 99 L.Ed.2d 889 (1988). These decisions rest on the Supreme Court's holding in *Garrett v. United States,* 471 U.S. 773, 105 S.Ct. 2407, 85 L.Ed.2d 764 (1985), that, if the government shows conduct subsequent to a prosecution, "it does not violate the Double Jeopardy Clause ... to prosecute the CCE offense after a prior conviction for one of the predicate offenses." *Id.* at 793, 105 S.Ct. at 2418. *See also id.* at 798, 105 S.Ct. at 2421 (O'Connor, J., concurring). In other words, "[o]ne who insists that the music stop and the piper be paid at a particular point must at least have stopped dancing himself before he may seek such an accounting." *Id.* at 790, 105 S.Ct. at 2417.

That the principles underlying *Garrett* survive *Grady* is rooted in the admonition that double jeopardy principles developed in the "classically simple situation presented in" single transaction cases not be readily transposed to the "multilayered conduct, both as to time and to place involved" in CCE and RICO cases.

Id. at 789, 105 S.Ct. at 2416. CCE and RICO are "compound-complex felonies," *United States v. Pungitore*, 910 F.2d 1084, 1109 (3d Cir. 1990), which often cannot be charged until after their individual predicate acts have been prosecuted. *See Garrett,* 471 U.S. at 788-89, 105 S.Ct. at 2416-17 (at time of initial prosecution, "it could not then have been said with any certainty that [defendant] would necessarily go ahead and commit the other violations required to render him liable on a CCE charge"). A similar exception was addressed in *Grady*:

> We recognized in *Brown v. Ohio,* 432 U.S. 161, 169, and n. 7]97 S.Ct. 2221, 2227, and n. 7, 53 L.Ed.2d 187] (1977), that when application of our traditional double jeopardy analysis would bar a subsequent prosecution, "[a]n exception may exist where the State is unable to proceed on the more serious charge at the outset because the additional facts necessary to sustain that charge have not occurred or have not been discovered despite the exercise of due diligence."

Grady, 110 S.Ct. at 2090 n. 7.

This case presents just such a situation because several of the predicate acts constituting the CCE charged against Gambino and the RICO conspiracy charged against Gambino and Romano occurred after their previous prosecutions.[2] Gambino's alleged criminal

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2. In his letter-brief, filed at the Court's request, Gambino challenges the RICO charge on the basis that it includes, as predicate acts, conduct for which he was previously prosecuted. Though this claim was not made in Gambino's initial brief, we address it along with the identical claim of Romano.

conduct, which underpins the CCE and RICO charges, continued well past his 1981 acquittal in *Gambino I.* This activity includes participating, in 1987 and 1988, in obtaining some twenty kilograms of cocaine, facilitating the escape, in 1987, of a co-defendant from INS detention in Florida, and negotiating narcotics transactions through March 1988. Romano's alleged criminal activity continued beyond his 1989 acquittal in *Adamita,* and includes participating in an extortionate credit conspiracy, using the telephone to facilitate narcotics trafficking, and continuing to conspire to import and distribute narcotics. It should be noted that this case is unlike *United States v. Russo,* 906 F.2d 77 (2d Cir. 1990) (per curiam), in which the government conceded that a subsequent prosecution for conduct that constituted predicate acts in a previous RICO conspiracy prosecution was barred. *But see United States v. Esposito,* 912 F.2d 60, 64-65 (3d Cir. 1990) (prosecution for individual predicate acts following acquittal on RICO charge not barred by double jeopardy).

Grady does not disturb this rationale. In fact, given the opportunity to expressly overrule *Garrett,* the Court in *Grady* cited the case with apparent approval. *See Grady,* 110 S.Ct. at 2090-91, 2094 n. 15; *see also Pungitore,* 910 F.2d at 1111 n. 29 ("We dismiss out of hand the possibility that *Grady* overruled *Garrett.* If the Supreme Court on such grossly dissimilar facts intended to abandon *Garrett,* we think it would have said so. Instead, both the majority and the dissent in *Grady* cited *Garrett* without ever hinting that *Garrett* no longer was good law.").

Accordingly, Count Three's CCE charge and Count Seven's RICO conspiracy charge may properly be prosecuted under the present indictment. It should be noted that, while the prosecution of Counts Three and Seven is not barred by double jeopardy, the rules of evidence remain applicable. The district court recognized this constraint by precluding the introduction of Frank Rolli's testimony against Gambino on Count One and by "forewarn[ing]" that it would consider at trial the admissibility under Fed.R.Evid. 403 of this testimony on Count Two. We leave to the district court's wise discretion the continued application of the rules to ensure the fair prosecution of Counts Three and Seven.

CONCLUSION

For the reasons discussed above, we hold that the prosecution of Gambino on Counts One and Two is barred by double jeopardy. We further hold that the prosecution of Gambino on Count Three and the prosecution of Gambino and Romano on Count Seven is not barred by double jeopardy. Accordingly, the order of the district court is affirmed, in part, and reversed, in part, and remanded. Upon remand, the district court shall consider whether to dismiss, with leave to represent, Counts One and Two of the indictment or to order redaction of the offending portions of the indictment.

Appendix B
Order of United States Court of Appeals
On Petition for Rehearing

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 1st day of February, one thousand nine hundred and ninety.

FILED: February 1, 1991

Docket Numbers 90-1104(L), 90-1106

PRESENT:

Hon. FRANK X. ALTIMARI,
Hon. J. DANIEL MAHONEY,
Circuit Judges.
Hon. MILTON POLLACK,
District Judge.

Appendix B
Order of United States Court of Appeals
On Petition for Rehearing

UNITED STATES OF AMERICA,

Appellee,

v.

GIUSEPPE GAMBINO, a/k/a "Joe," and
MATTEO ROMANO,

Defendants-Appellants.

A petition for a rehearing having been filed herein by Appellant MATTEO ROMANO

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

/s/_____
Elaine B. Goldsmith
Clerk

Appendix C
Opinion of United States District Court

UNITED STATES OF AMERICA

v.

Giuseppe GAMBINO, a/k/a "Joe," Rosario Naimo, a/k/a "Saro," a/k/a "Don Saro," a/k/a "Sarino," a/k/a "Sal," a/k/a "Casimiro DiLorenzo," a/k/a "Barry Beiner," Lorenzo Mannino, a/k/a "Lore," Francesco Inzerillo, a/k/a "Frank," a/k/a "Ciccio," Matteo Romano, Emanuele Adamita, a/k/a "Manuele," a/k/a "Mario DiLorenzo," a/k/a "Stephan Milazzo," Joseph LaRosa, a/k/a "Little Joe," a/k/a "Cardillo," Salvatore LoBuglio, a/k/a "Toto," a/k/a "the engineer," Giuseppe D'Amico, a/k/a "Pino," a/k/a "Joe," Salvatore D'Amico, Francesco Cipriano, a/k/a "Frank," a/k/a "Ciccio," a/k/a "Francino," Salvatore Candela, a/k/a "Toto," Paolo D'Amico, Carmelo Guarnera, and John Doe, a/k/a "Sasha," Defendants.

No. 6th "S" Cr. 919 (PKL).

United States District Court,
S.D. New York.

Jan. 25, 1990.

Defendants were indicted for alleged participation in conspiracy to import and distribute narcotics. Defendants moved to dismiss charges under double jeopardy clause, to suppress evidence, and for separate trials. The District Court, Leisure, J., held that: (1) successive drug conspiracy prosecutions were not sufficiently similar to violate double jeopardy clause; (2)

one defendant's acquittal of earlier narcotics importation scheme collaterally estopped reintroduction of proof of that scheme in attempt to convict him of conspiracy to import narcotics under successive indictment; and (3) interest in trying coconspirators together warranted severance into two groups, even though allegation that all defendants had worked closely together in narcotics conspiracy did not warrant joint trial.

Ordered accordingly.

Otto G. Obermaier, U.S. Atty., S.D. New York, New York City (Frances M. Fragos, Andrew C. McCarthy, of counsel), for U.S.

Judd Burstein, Edward Panzer, New York City, for defendant Gambino.

Charles Carnesi, Salvatore Russo, Brooklyn, N.Y., for defendant Mannino.

Ira J. Friedman, Brooklyn, N.Y., for defendant Inzerillo.

Gerald L. Shargel, Gail E. Laser, New York City, for defendant Romano.

Martin G. Fogelson, New York City, for defendant Adamita.

Golub & Dunn, New York City, Mitchell A. Golub, for defendant LaRosa.

Edward M. Kratt, New York City, for defendant LoBuglio.

Martin Geduldig, Hicksville, N.Y., for defendant Giuseppe D'Amico.

Thomas D. White, New York City, for defendant Cipriano.

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Culleton & Marinaccio, Bronx, N.Y., James Culleton, for defendant Candela.

Brown, Berne & Serra, Bronx, N.Y., Wesley M. Serra, for defendant Guarnera.

ORDER & OPINION

LEISURE, District Judge:

On December 14, 1989, the Grand Jury returned the sixth superseding indictment (hereinafter, the "indictment," the "pending indictment," or the "1989 indictment") against the defendants in this case.[1] The evidence presented to the Grand Jury was the result of a long-term investigation by the federal government into an international organization known as "the mafia" or "la cosa nostra." According to the government, this organization, or system of organizations, is responsible for the importation and distribution of large quantities of narcotics in violation of federal law. To supplement its income from the narcotics trade, the organization also allegedly participates in gambling, loansharking, and extortion. The government charges that murder and other acts of violence are carried out by members of the organization to facilitate its operations.

Certain of the defendants have moved the Court to dismiss the charges against them under the double

1. The first indictment was filed by the Grand Jury on December 14, 1988. Of the defendants charged in the sixth superseding indictment, Rosario Naimo, Paolo D'Amico and John Doe, a/k/a "Sasha," are fugitives.

jeopardy clause of the fifth amendment to the U.S. Constitution, to block the government from introducing specific evidence to the jury under the principle of collateral estoppel, to sever the defendants into separate trials, to dismiss certain counts of the indictment as being duplicitous or multiplicitous, and to suppress physical evidence seized by government agents from the homes of the defendants.[2] Rather than burden the record with an overview of the alleged facts uncovered by the government investigation, the Court will discuss specific facts in regard to the motions made by each particular defendant. First, however, a brief summary of the charges in the pending indictment is in order.

The first count of the sixth superseding indictment charges that all defendants participated in a fourteen-year conspiracy to import heroin and cocaine into the United States in violation of Sections 802, 812, 951, 952, 960(a)(1), 960(b)(1)(A) and (B), and 963 of Title 21, and Section 2 of Title 18, of the U.S. Code. This conspiracy existed and functioned from January 1, 1975, to the date of the filing of the indictment. The Grand Jury charges that responsibilities in the importation conspiracy--such as investment, international smuggling, domestic reception, storage, and primary and secondary wholesale distribution of the narcotics--were divided between defendants. Count one lists 172 alleged overt acts which refer to specific narcotics transactions, meetings and communications between defendants and other co-conspirators.

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2. All the defendants before the Court filed motions asking for one or more types of relief, except for Salvatore D'Amico who filed no motions.

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Count two of the indictment incorporates the overt acts and alleged methods employed by the conspiracy as set out in count one, and charges all defendants with a conspiracy to distribute or to possess with intent to distribute heroin and cocaine in violation of Sections 802, 812, 841(a)(1) and (b)(1)(A) and 846 of Title 21, and Section 2 of Title 18, of the U.S.Code.

Count three of the pending indictment charges defendant Giuseppe Gambino with the organization and supervision of a continuing criminal enterprise in violation of 21 U.S.C. § 848(a) and (b). The indictment alleges numerous substantive violations of the narcotics laws and incorporates the violations set out in counts one and two. Defendant Gambino allegedly supervised this continuing criminal enterprise from January 1, 1975 to the date of the indictment. In count four of the indictment, defendant Rosario Naimo is charged under Section 848 in a similar fashion. Defendant Naimo is a fugitive at this time.

Count five of the indictment charges defendants Gambino, Naimo, LoBuglio, and Salvatore D'Amico with a single substantive distribution of over 100 grams of heroin on March 15, 1988. Count six charges defendants Gambino and Mannino with obstruction of justice in violation of Sections 1512 and 2 of Title 18. During the period from December 1, 1988 up through the filing of the indictment, defendants Gambino and Mannino allegedly took action to intimidate and interfere with the testimony of a government informant, Giovanni Zarbano.

Count seven of the indictment charges all defendants with participating in a criminal enterprise in violation of the RICO statute, 18 U.S.C. §§ 1961-62. This enterprise allegedly existed from January 1, 1970 up to

the date of the indictment. The Grand Jury charges that defendants engaged in a pattern of racketeering activity consisting of forty-two predicate acts. These acts describe alleged narcotics transactions, bribery of public officials, violations of the Travel Act, extortion, gambling, murder, and obstruction of justice.

This order and opinion is divided into three parts. First, the Court will consider the unique and complex motions of defendants Gambino, Romano, and Adamita based on the double jeopardy clause of the fifth amendment to the U.S. Constitution and the principle of collateral estoppel. Second, the Court will turn to the severance motions brought by certain of the defendants, and will discuss how the group of defendants should be divided up for trial purposes. Third, the Court will consider several motions brought by individual defendants--defendant LoBuglio's motion to suppress physical evidence, and LoBuglio's and defendant LaRosa's motions to dismiss the first two counts of the indictment as being duplicitous and multiplicitous.

I. DOUBLE JEOPARDY AND COLLATERAL ESTOPPEL

The double jeopardy clause of the fifth amendment to the U.S. Constitution provides that "[n]o person ... shall be subject for the same offence to be twice put in jeopardy of life or limb." Courts should grant a motion for double jeopardy and thus bar the subsequent prosecution when the offenses charged appear in fact and law the same. *United States v. Nersesian,* 824 F.2d 1294, 1319 (2d Cir.), *cert. denied,* 484 U.S. 958, 108 S.Ct. 357, 98 L.Ed.2d 382 (1987).

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The Second Circuit has held that a court must examine the totality of the circumstances in ruling on a double jeopardy motion regarding successive conspiracy prosecutions. The following factors should be considered:

> (1) the criminal offenses charged in successive indictments; (2) the overlap of participants; (3) the overlap of time; (4) similarity of operation; (5) the existence of common overt acts; (6) the geographic scope of the alleged conspiracies or location where overt acts occurred; (7) common objectives; and (8) the degree of interdependence between alleged distinct conspiracies.

United States v. Reiter, 848 F.2d 336, 340 (2d Cir. 1988); *United States v. Korfant,* 771 F.2d 660, 662 (2d Cir. 1985) (per curiam).[3] The Second Circuit has applied similar factors in determining whether successive RICO prosecutions violate the double jeopardy clause. *United States v. Russotti,* 717 F.2d 27, 33 (2d Cir.), *cert. denied sub nom. Manino v. United States,* 465 U.S. 1022, 104 S.Ct. 1273, 79 L.Ed.2d 678 (1984).

The nature of the crime of conspiracy complicates the double jeopardy inquiry. Whether the object of the conspiracy is to commit one or many crimes, it is the unlawful agreement between co-conspirators that the federal statutes punish. *Braverman v. United States,* 317 U.S. 49, 53, 63 S.Ct. 99, 101, 87 L.Ed. 23 (1942). A court must keep in mind that the same conspiracy may be

3. These factors are known as, and will be referred to in this opinion, as the "*Korfant* factors."

established by different aggregations of proof. *United States v. Mallah,* 503 F.2d 971, 985 (2d Cir. 1974), *cert. denied,* 420 U.S. 995, 95 S.Ct. 1425, 43 L.Ed.2d 671 (1975). While overt acts may be the most concrete clues in an indictment as to the nature of the underlying conspiracy, too much reliance on overt acts may confuse the proper aims of the judicial inquiry. *See id.* (*citing Short v. United States,* 91 F.2d 614, 624 (4th Cir.1937)). The government should not be permitted to divide overt acts stemming from the same conspiracy into different conspiracy prosecutions. *See United States v. Papa,* 533 F.2d 815, 820 (2d Cir.), *cert. denied,* 429 U.S. 961, 97 S.Ct. 387, 50 L.Ed.2d 329 (1976).

The moving defendant bears the burden of proof that a subsequent government prosecution violates the double jeopardy clause. However, the burden may switch to the government to prove distinct conspiracies if the defendant makes a sufficient showing of overlap.

> Where the Government alleges that defendants conspired with others, and there is evidence that participants of one conspiracy are acquainted with personnel in the other, that the conspiracy cannot operate without a larger organization backing it up, and that dates and geographic areas overlap, the burden of proving separate conspiracies shifts to the prosecution.

Reiter, supra, 848 F.2d at 341; *United States v. Abbamonte,* 759 F.2d 1065, 1069 (2d Cir. 1985). In short, if a movant makes a sufficient showing under the *Korfant* factors, then the burden of proof switches to the government.

Appendix C
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1. Defendant Gambino's Motions

Giuseppe Gambino argues that counts one, two, and three of the indictment should be dismissed under the double jeopardy clause. Those counts allege, respectively, that Gambino conspired from January 1, 1975 to December 14, 1988 to import and distribute narcotics, and that he engaged in and supervised a continuing criminal enterprise. In 1981, Gambino was acquitted by a jury in the Eastern District of New York on charges that he had conspired from August 1, 1979 to March 18, 1980 to import heroin into the United States. *United States v. Gambino,* 80 Cr. 131 (E.D.N.Y.) (Neaher, J.).[4] Gambino was charged with violating 21 U.S.C. §§ 952(a) and 960(a)(1) and was acquitted after several days of trial.

Gambino relies on a combination of double jeopardy and collateral estoppel arguments in urging dismissal of the first three counts of the 1989 indictment. First, he argues that count one should be dismissed on "traditional" double jeopardy grounds, as it charges certain overt acts which were central to the 1981 trial and therefore alleges the same conspiracy. Second, he claims that the principle of collateral estoppel bars prosecution on count two. Third, Gambino argues that the third count of the 1989 indictment should be dismissed under the double jeopardy clause, because conspiracy to import heroin is a lesser included offense of a continuing criminal enterprise. Each of these will be considered in turn.

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4. The Eastern District trial will be referred to as the "1981 trial." The indictment in that case will be referred to as the "1980 indictment." The indictment in the case at bar will be referred to as the "1989 indictment."

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A. Gambino's Motions as to Count One

i. Double Jeopardy

With regard to count one, Gambino argues that "[r]arely has there ever been a case where a double jeopardy claim on a conspiracy charge is so plain." Gambino's Memorandum of Law at 10. The fact that the 1989 indictment alleges certain overt acts which were central to the government's failed proof in the 1981 trial, Gambino claims, is indisputable proof that both indictments allege the same conspiracy.[5] In his reply memorandum of law, Gambino argues that the multi-factor test of *Reiter* and *Korfant* is irrelevant, because the conspiracies are the same on the faces of the indictments.

The Court does not accept Gambino's contentions in this regard and will apply the *Korfant* factors in its analysis of Gambino's motion. To start, one of the *Korfant* factors, and therefore one of the concerns the Court must weigh, is the existence of common overt acts. *Reiter, supra,* 848 F.2d at 340; *Korfant, supra,* 771 F.2d at 662. This factor is but one of eight which the Court must consider, and is not dispositive of the entire motion. Accepting

5. The 1980 indictment charged no overt acts.

Gambino's legal position would create a large and irrational loophole in the multi-factor test.[6]

[1] Application of the *Korfant* factors to Gambino's double jeopardy motion on count one of the 1989 indictment shows insufficient similarity between the two alleged conspiracies to dismiss that count. Several of the factors do show a close relationship between the two prosecutions: both charge the importation of heroin into the United States under 21 U.S.C. §§ 952 and 960(a)(1); both involve Emanuele Adamita, as a co-conspirator in the 1981 trial and as a co-defendant in the 1989 indictment; the timeframe of the 1980 indictment is contained within the timeframe of 1989 indictment; the modes of operations alleged are similar; some overt acts charged in the 1989 indictment were part of the evidence at the 1981 trial; the geographic areas alleged in the 1980 indictment are contained within those alleged in the 1989 indictment; and there were common objectives, to wit, the importation of narcotics for financial profit. Given such a showing by Gambino, the burden has indeed shifted to the government to show distinct conspiracies. *See Reiter, supra,* 848 F.2d at 341. But the Court finds that the government has sustained this burden.

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6. The legal position put forward by Gambino's counsel would create new law. Whenever a subsequent conspiracy indictment charged overt acts which had either been charged in a previous indictment or had been part of the evidence in a previous conspiracy prosecution, then the entire subsequent conspiracy indictment would have to be dismissed. The Second Circuit has implicitly rejected this approach by considering the totality of the circumstances through the multi-factor test of *Reiter* and *Korfant.*

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Opinion of United States District Court

Count one of the 1989 indictment charges a fourteen-year conspiracy to import both heroin and cocaine, while the 1981 prosecution alleged an eight-month conspiracy to import heroin only. The 1989 indictment lists 172 overt acts in furtherance of the conspiracy, 39 of which mention Giuseppe Gambino by name. Of those 39 acts, only 2 concern events covered in the 1981 trial. Many of the 39 acts set out in the 1989 indictment allege conversations and meetings among co-conspirators the contents and evidentiary value of which the Court is unaware. But there are also detailed allegations of narcotics transactions having no relation to the 1981 trial, including a scheme to transfer cocaine from Florida to New York undertaken after Gambino's 1981 acquittal.[7] Of the 15 co-defendants and 27 co-conspirators in the 1989 indictment, only three, one of whom was Gambino and another a government informant, were involved in the 1981 trial.

A comparison of this case with the facts of *United States v. Reiter* demonstrates that Gambino's double jeopardy motion with respect to count one should not succeed. In *Reiter,* the defendant was indicted three times on conspiracy charges, referred to by the Second Circuit as Reiter I, Reiter II, and Reiter III. *See generally United*

7. The existence of common overt acts which are "crucial parts of the proof of conspiracy" tends to cut across the multi-factor test and suggest a single conspiracy. *United States v. Marable,* 578 F.2d 151, 154 (5th Cir. 1978). The allegations of conspiracy to import in the 1981 trial are important and substantive parts of the government's proposed proof under the 1989 indictment, yet they are not so crucial as to outweigh the other factors militating for denial of Gambino's claim.

States v. Reiter, supra, 848 F.2d at 337-40. The most closely related conspiracies, eventually determined by the Second Circuit as being distinct for double jeopardy purposes, were Reiter II and Reiter III. *Id.* at 341. In both Reiter II and Reiter III, the defendant was charged with conspiring to distribute and to possess with intent to distribute narcotics, as well as with other statutory offenses. Of the sixteen defendants charged in Reiter II and seven in Reiter III, two individuals are named in both indictments. Reiter II was a four-month conspiracy contained within the timeframe of Reiter III which was a seven-year conspiracy. Though the geographic areas where the alleged events took place overlap, there was no duplication of overt acts, and, in fact, all the overt acts in Reiter III took place after the timeframe of Reiter II had ended. The Second Circuit found that the defendant Reiter had made a sufficient showing of similarity so that the burden switched to the government, but that the government had carried this burden and proven separate and distinct conspiracies. *Reiter, supra,* 848 F.2d at 341-42.

Despite the insertion of certain overt acts in Gambino's 1989 indictment which were central to the 1981 trial, the Court believes that the situation at bar presents two conspiracies more distinct than Reiter II and Reiter III. In brief, the magnitude of the conspiracy alleged in the 1989 indictment overwhelms the scale of the conspiracy alleged in the 1980 indictment. The differences between Reiter II and Reiter III are less drastic. It would be a gross extension of double jeopardy protection to dismiss all of count one of the 1989 indictment, which charges fifteen defendants with a fourteen-year conspiracy to import narcotics, based on Gambino's 1981 acquittal.

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ii. Collateral Estoppel

[2] Defendant Gambino argues that if the Court decides to deny his motion to dismiss count one of the indictment on double jeopardy grounds, which the Court has done, then the Court should prevent the government from introducing any evidence of Gambino's alleged involvement in the 1980 heroin importation scheme under the principle of collateral estoppel. With regard to collateral estoppel, Judge Friendly has written:

> Application of the principle inevitably has two phases. The first is to determine what the first judgment determined, a process in which ... the court must look, not simply to the pleadings but to the record in the prior trial. The second is to examine how that determination bears on the second case.

United States v. Jackson, 778 F.2d 933, 938-39 (2d Cir.), *cert. denied,* 479 U.S. 910, 107 S.Ct. 308, 93 L.Ed.2d 282 (1986); *United States v. Kramer,* 289 F.2d 909, 913 (2d Cir. 1961). A defendant asserting collateral estoppel bears the burden of establishing what factual issues the jury necessarily resolved during the first trial. *United States v. Medina,* 709 F.2d 155, 156 n. ** (2d Cir. 1983). "This burden is particularly onerous where the acquittal in the first trial involves the crime of conspiracy." *United States v. Clark,* 613 F.2d 391, 400 (2d Cir.), *cert. denied,* 449 U.S. 820, 101 S.Ct. 78, 66 L.Ed.2d 22 (1980); *United States v. Nenadich,* 689 F.Supp. 285, 292 (S.D.N.Y. 1988).

The Court is sensitive to the language of the U.S. Supreme Court which has stated that:

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> [t]he federal decisions have made clear that the rule of collateral estoppel in criminal cases is not to be applied with the hypertechnical and archaic approach of a 19th century pleading book, but with realism and rationality.

Ashe v. Swenson, 397 U.S. 436, 444, 90 S.Ct. 1189, 1194, 25 L.Ed.2d 469 (1970); *see also United States v. Citron,* 853 F.2d 1055, 1058 (2d Cir. 1988) (stating that a court should not make the defendant's burden overly difficult by postulating "hypertechnical and unrealistic" grounds on which the jury could have rested). In a close case, a court may weigh the equities of allowing a subsequent prosecution. See *United States v. Mespoulede,* 597 F.2d 329, 335 (2d Cir. 1979). "For whatever else that constitutional guarantee [against double jeopardy] may embrace ..., it surely protects a man who has been acquitted from having to 'run the gauntlet' a second time." *Ashe v. Swenson, supra,* 397 U.S. at 445-46, 90 S.Ct. at 1195.

The bulk of the prosecution's evidence in Gambino's 1981 trial consisted of the direct testimony of Frank Rolli, a government informant who allegedly conspired with Giuseppe Gambino and Emanuele Adamita to import heroin from Italy into the United States. Rolli testified that he met twice with Gambino and Adamita in Brooklyn during March, 1980, and that the three men discussed a plan to smuggle approximately ten kilograms of heroin through customs at Kennedy Airport. (Transcript of 1981 Eastern District trial ("1981 trial Tr.") at 103-13, 126-31). Rolli testified that Gambino agreed to pay him $30,000 for his assistance (1981 trial Tr. at 112). Rolli

and Adamita then travelled to Italy at which time Rolli became aware that the quantity of heroin to be imported had risen to nearly forty kilograms. According to Rolli, Gambino had said at one of their Brooklyn meetings that he would be in contact with "his friends" regarding the final amount to be imported (1981 trial Tr. at 403-04). At oral argument, counsel for defendant Gambino suggested that Gambino was thus aware of the change in the size of the shipment (Transcript of oral argument before the Court, Dec. 28, 1989 ("Oral Argument Tr.") at 47-48). The heroin was seized at Kennedy Airport and Gambino was subsequently arrested, tried, and acquitted.

In their briefs and at oral argument, counsel for the government and for defendant Gambino presented markedly different interpretations of the jury's acquittal. The government claims that the jury's verdict was based on the lack of proof that Gambino knowingly and intentionally joined the 40 kilogram importation conspiracy which was charged in the 1980 indictment. The government focuses on the fact that Rolli's meetings with Gambino both occurred when the quantity of heroin was expected to be 10 kilograms or less. Thus the government argues that it should not be estopped from introducing evidence that Gambino conspired to import the smaller shipment initially envisioned.

Counsel for Gambino view the jury's verdict of acquittal more broadly. They argue that the jury, viewing the evidence presented to it with regard to Gambino's involvement in the importation conspiracy, found that Gambino simply had no involvement with the plan. They urge the Court not to read between the lines of the verdict and not to find that the jury made a distinction

between the 10 kilogram shipment initially discussed and the 40 kilogram shipment eventually carried out. Gambino's 1981 acquittal should be interpreted as a finding of complete non-involvement with the importation conspiracy.

The Court believes that while Gambino's argument is overstated,[8] the government should be barred from introducing proof of Gambino's alleged involvement in the 1980 importation conspiracy, as set out in overt acts 11-18 of the 1989 indictment, for the purposes of proving count one of the indictment during the upcoming trial. As Mr. Panzer, co-counsel for defendant Gambino, stated at oral argument, the verdict seemed to come down to the question of the credibility of the witnesses. (Oral Argument Tr. at 22). Though the Court will not conjecture as to whether the jury believed the testimony of defendant Gambino or the deposition of Emanuele Adamita, the testimony of informant Frank Rolli was successfully attacked by Gambino's 1981 trial counsel.

Most all of the government's case in the 1981 trial rested on the testimony of Rolli who met with Gambino

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8. It would be improper for the Court to rule that the 1981 verdict demonstrates Gambino's total non-participation with the alleged 1980 importation scheme. Depending on the facts required to prove the particular offense charged, the Court could permit subsequent prosecutions based on the 1980 scheme. For example, the government might be entitled to use the same testimony in order to establish another crime--aiding and abetting--at a second trial. *See United States v. Jackson*, 778 F.2d 933, 940 (2d Cir.), *cert. denied*, 479 U.S. 910, 107 S.Ct. 308, 93 L.Ed.2d 282 (1986); *United States v. Clark*, 613 F.2d 391, 402 (2d Cir.), *cert. denied*, 449 U.S. 820, 101 S.Ct. 78, 66 L.Ed.2d 22 (1980) (conspiract acquittal does not bar subsequent prosecution for substantive offense).

and Emanuele Adamita twice in Brooklyn allegedly to arrange for the heroin shipment. In viewing the transcript of Rolli's testimony, the Court believes that credibility problems overshadowed the substance of the testimony. First, Rolli testified on cross examination that everything Gambino had said during both Brooklyn meetings added up to no more than 15 to 20 minutes of conversation. (1981 trial Tr. at 267-68). Second, Rolli admitted to stealing goods on more than one occasion while working for Alitalia Airlines at Kennedy Airport, and to threatening to kill his supervisor, presumably to prevent exposure. (1981 trial Tr. at 239-40, 243, 245). Rolli denied stealing specific other goods, such as leather jackets, watches, and a gold bar, and selling them from a boutique on 18th Avenue in Brooklyn. (1981 trial Tr. at 240-43). Third, Rolli admitted to burning his car, to lying under oath to an insurance company, and to collecting $9000. (1981 trial Tr. at 246-54). Fourth, Rolli testified that government investigators had attached an eavesdropping device to his person prior to both his meetings with Gambino, but that he had ripped the devices off on both occasions and had thus not preserved recordings of the incriminating conversations (1981 trial Tr. at 98, 126).

These significant weaknesses with the testimony of the government's chief witness demonstrate that the 1981 jury simply did not believe that the government had sustained its burden of proving Gambino's guilt beyond a reasonable doubt. It is certainly possible that the jury might have found Gambino guilty of conspiring to import 10 kilograms of heroin, while it felt there was insufficient evidence to convict him for conspiring to import 40 kilograms. Yet the Court believes that such a conclusion

would represent precisely the "hypertechnical and archaic approach" to collateral estoppel which the Supreme Court warned against in *Ashe v. Swenson, supra,* 397 U.S. at 444, 90 S.Ct. at 1194. It is only just and fair for the Court to rule that the government should not be able to reintroduce proof of the 1980 importation schemes in its attempt to convict Gambino of conspiring to import narcotics under the 1989 indictment.

B. Gambino's Motions as to Count Two

i. Double Jeopardy

[3] Gambino also moves for dismissal of count two of the 1989 indictment on double jeopardy grounds. Count two charges a fourteen-year conspiracy to distribute or to possess with intent to distribute narcotics in violation of 21 U.S.C. § 841. Count two incorporates the same 172 overt acts as set out in count one; Gambino's motion to dismiss all of count two on double jeopardy grounds must fail for the same reasons that his motion to dismiss count one has failed. In addition, the charging of a distinct statutory offense, distribution rather than importation, further distinguishes the 1989 indictment from the 1980 indictment. See *Albernaz v. United States,* 450 U.S. 333, 344 n. 3, 101 S.Ct. 1137, 1145 n. 3, 67 L.Ed.2d 275 (1981) ("It is well settled that a single transaction can give rise to distinct offenses under separate statutes without violating the Double Jeopardy Clause." (citations omitted)).

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ii. Collateral Estoppel

[4] Gambino also moves the Court to bar the government from introducing evidence of the 1980 importation scheme to prove the distribution conspiracy charged in count two of the 1989 indictment. To grant Gambino's motion, the Court would have to find that the 1981 jury's verdict of acquittal for conspiracy to import also by necessity meant an acquittal for conspiracy to distribute. The Court did rest its decision to bar the government from introducing evidence of the 1980 importation scheme on the fact that it believed that credibility problems with the government's chief witness, Frank Rolli, lay behind the jury's verdict. This might lead the Court to rule that any testimony by Rolli, whether to show a conspiracy to import or to distribute would be incredible.

The Court is hesitant, however, to apply the principle of collateral estoppel when different charges, requiring the proof of different facts, are alleged by the government. Looking behind the rationale of the 1981 jury's verdict is one matter; deciding how the 1981 jury would have come out on a distinct factual issue is another. Thus the Court will allow the government to introduce

evidence of the 1980 scheme to prove count two of the 1989 indictment.[9]

C. Gambino's Motions as to Count Three

i. Double Jeopardy

Defendant Gambino moves the Court to dismiss count three of the 1989 indictment against him on double jeopardy grounds. Count three charges that Gambino was engaged in and supervised a continuing criminal enterprise in violation of 21 U.S.C. § 848. Gambino argues that since the Court should dismiss the first two counts of the indictment on double jeopardy grounds--those alleging conspiracies to import and distribute narcotics--count three must be dismissed as well. As the Court did not decide to dismiss either of the first two counts on double jeopardy grounds, Gambino's motion to dismiss the third count on those grounds must fail.

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9. The parties are forewarned that the Court will have to consider the admissibility of evidence of the 1980 scheme to prove count two of the indictment under Fed.R.Ev. 403 due to the potential undue prejudicial effects to defendant Gambino. The Court will also have to consider a limiting instruction to the jury, including explanation of the facts concerning Gambino's 1981 acquittal, to be certain that the jury will be able to compartmentalize the evidence and apply it only towards the counts of the indictment for which it was admitted to prove.

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ii. Insufficient Quantity of Narcotics

[5] Gambino argues that if the Court rules to bar the government from introducing proof of the 1980 importation scheme at trial, then the government has not fulfilled the minimum-quantity requirements of 21 U.S.C. § 848. Under 21 U.S.C. § 848(b)(2)(A), the government must prove that the defendant engaged in a continuing criminal enterprise involving at least 30 kilograms of heroin or 150 kilograms of cocaine if it wishes to seek life imprisonment or heavy fines under § 848(a). See 21 U.S.C. §§ 848(b)(2)(A), 841(b)(1)(B). According to Gambino, if the government is collaterally estopped from introducing evidence of the 1980 importation scheme, then this minimum-quantity requirement cannot be met.

It is, however, up to the jury to decide whether the government has proven beyond a reasonable doubt that a defendant has engaged in a continuing criminal enterprise involving 30 kilograms of heroin or 150 kilograms of cocaine. If the jury convicts Gambino of involvement with less than the minimum amounts, then the time would be ripe for a sufficiency argument by the defendant. *See* Government's Memorandum of Law at 52 n. *. The government has alleged in the indictment numerous narcotics transactions, the details of which will be presented to and weighed by the jury. Thus Gambino's motion to dismiss count three of the indictment must fail.

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2. Defendant Romano's Motions

A. Double Jeopardy Motions as to Counts One and Two

On March 31, 1988, Matteo Romano and 27 others were charged with conspiracy to import and distribute narcotics. SS 88 Cr. 217 (JES) (hereinafter "Romano I").[10] The indictment charged a three-year conspiracy, commencing on January 1, 1985 and ending on June 30, 1988, and cited 105 overt acts occurring in New York City and other locations in the Eastern United States. Romano was eventually tried with thirteen co-defendants in the Southern District of New York and acquitted in early 1989. Romano now argues that his acquittal in Romano I precludes his prosecution under the pending indictment on double jeopardy grounds.

Both Romano and the government admit to the relevance of the *Korfant* factors in determining whether the offenses charged in Romano I and the current indictment are in fact and law the same. The parties put forward, however, markedly different characterizations of the two prosecutions against defendant Romano. The Court will undertake a detailed examination of the indictment and trial in Romano I as compared with counts one and two of the pending indictment in light of the *Korfant* factors.

The statutory offenses charged in the Romano I indictment and the first two counts of the 1989 indictment are very similar. While the importation and distribution

10. The trial was officially called *United States v. Adamita.*

of narcotics are alleged in a single count in the Romano I indictment, they are split into separate counts in the 1989 indictment. The only substantial difference is that the Romano I indictment charged a conspiracy to export controlled substances under 21 U.S.C. § 953. Also, in addition to charging violations involving heroin and cocaine, the Romano I indictment charges the defendants with the distribution of marijuana. On the whole, however, the Court views the offenses charged in the two indictments as essentially similar.

There is an overlap in the alleged participants in the two indictments. The Romano I trial charged 14 defendants and referenced 67 co-conspirators, while the 1989 indictment charged 14 defendants and referenced 27 co-conspirators. Out of these participants, there are three common defendants and 18 common co-conspirators. This overlap in personnel demonstrates that certain of the participants in the two alleged conspiracies are indeed "acquainted." *See Reiter, supra,* 848 F.2d at 341. However, the fact that the majority of named co-defendants and co-conspirators in the two indictments do not overlap shows that the indictments charge two essentially different groups of individuals.

The defendants common to both indictments are Matteo Romano, Emanuele Adamita, and Joseph LaRosa. The Court takes note, as the government pointed out at oral argument, that the allegedly central figures of the conspiracy charged in the 1989 indictment--Giuseppe Gambino, Rosario Naimo, and Lorenzo Mannino--were

not mentioned in the Romano I indictment or trial.[11] Thus while the conspirators charged in the two indictments do overlap, the leaders of the conspiracies are distinct.

In terms of modes of operation and objectives, the conspiracies are similar as well. Both employed human couriers to smuggle narcotics from Europe into the United States, though at times the conspiracy alleged in the pending indictment sent narcotics concealed in commercial packages. When the narcotics arrived in the United States,

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11. Counsel for defendant Romano point to a picture of Matteo Romano, Emanuele Adamita, and Giuseppe Gambino which was admitted into evidence at the Romano I trial as showing that Gambino was involved in the conspiracy charged in the Romano I indictment. The government argues in response that Gambino was never identified for the jury, and that for double jeopardy purposes the picture of Gambino is irrelevant. The question arises, at this time and at others, what should be central to the Court's inquiry--what was received into evidence for the jury to consider, or what actual similarities existed between the conspiracies. On the one hand, the Second Circuit has shown great concern over the ability of the government to divide the same conspiracy into separate chunks of proof in order to dilute the risk of an adverse jury verdict. *See United States v. Papa, supra,* 533 F.2d at 820; *United States v. Mallah, supra,* 503 F.2d at 985. On the other hand, defense counsel should not be given complete license to introduce evidence of the similarity between the conspiracies that was not touched on in either the prior indictment or at trial. It is, after all, the conspiracy for which the defendant was previously tried which is relevant to the double jeopardy inquiry. The Court will consider, however, arguments by counsel as to the similarity between the conspiracies, even if such evidence was not admitted into evidence and shown to the jury. But in this instance, the Court does not consider that a single photograph of Gambino, Romano, and Adamita standing in front of Concord Furniture, Romano's furniture store, carries much weight in showing that the two conspiracies at issue are similar for double jeopardy purposes.

it was part of both conspiracies that they would be transferred to secondary wholesale distributors, who at often times would dispense them using legitimate businesses as fronts. In the Romano I trial, these businesses were usually pizza parlors and in one instance a clothing store. In the 1989 indictment, the government charges the use of a furniture store, a Brooklyn cafe, and construction sites for the storage and distribution of narcotics. To facilitate the narcotics trade, both conspiracies employed pay telephones, codes, threats, and acts of violence. The objectives of both conspiracies were to sell narcotics to enrich their members.

The parties dispute the degree to which the two alleged conspiracies overlap in time. On the faces of the indictments, Romano I charged a conspiracy to import and distribute narcotics stretching from January 1, 1985 to June 30, 1988, while the conspiracy charged in the 1989 indictment allegedly existed from January 1, 1975 up to the filing of the indictment on December 14, 1988. Counsel for defendant Romano argue, however, that the identity of the timeframe is greater than the three and one-half years evident from the faces of the indictments, as the government in Romano I actually introduced evidence in that case stretching back to the mid-1970s. Counsel claim that "nearly every overt act charged in the [1989] indictment before January 1, 1985 was part of the evidence at the Romano I trial." (Defendant Romano's memorandum of law at 16).

The government vigorously contests this attempted expansion of the scope of the Romano I conspiracy. The government claims that evidence of narcotics dealing before 1985 was admitted in Romano I solely for purposes

of impeachment, and that Judge Sprizzo specifically instructed the jury not to rely on any evidence of pre-1985 dealing in deciding whether the conspiracy charged in the indictment existed. In reply, counsel for Romano argue that regardless of whether the evidence was admitted to the jury for probative purposes, it still goes to the central question before the Court--are the two conspiracies charged one and the same?

As stated in footnote 11 above, though the Court will consider all information put forward by defendant Romano which demonstrates the similarity between the conspiracies, the Court will focus its inquiry on the evidence received at trial in Romano I and the conspiracy which the government actually tried to prove in that case to support the charges in the Romano I indictment. The Court therefore does not give great weight to the evidence of drug transactions prior to 1985. Furthermore, those transactions as brought out during the testimony of Filippo Ricupa do not necessarily demonstrate the existence of the same conspiracy stretching back to the mid-1970s. Thus the Court agrees with the government that the overlap in time between Romano I and the 1989 indictment is three and one-half years only.[12]

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12. The government points to statements made by Judge Sprizzo and Mr. Shargel, counsel for defendant Romano both during Romano I and in the case at bar, which might indicate that the transactions testified to by Ricupa and the conspiracy alleged in the Romano I indictment were unrelated. It is more likely that those comments simply referred to the fact that evidence of pre-1985 transactions was not admissible to prove the conspiracy alleged in the indictment, rather than a decision by the judge, or an admission by Mr. Shargel, that the conspiracy could never be shown to exist before 1985 for double jeopardy purposes.

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A comparison of the geographic scopes of the two alleged conspiracies shows some similarity but also some significant differences. The majority of conspiratorial acts in both indictments occurred in the vicinity of 18th Avenue in Brooklyn. In addition, acts are alleged to have taken place in Italy and along the U.S. Eastern seaboard in Washington, D.C. and Philadelphia. The 1989 indictment alone refers to activities in Florida, involving cocaine transactions and the escape of Emanuele Adamita from immigration detention. These more recent alleged criminal activities in Florida suggest a dimension of the conspiracies alleged in the 1989 indictment wholly lacking in the Romano I indictment.

Romano argues that six overt acts are repeated word for word in both indictments, and that 26 of the acts alleged in the 1989 indictment were explicitly part of the evidence at the first trial. The government admits to three principal areas of overlap between the overt acts alleged in the 1989 indictment and the proof introduced during the Romano I trial. First, overt acts 24-32 of the 1989 indictment allege an importation scheme using couriers and smuggled packages of heroin which operated from February, 1985 through March, 1986. The scheme was run by at least three individuals who were co-conspirators in both cases. Second, overt acts 48-56 and 58-63 of the 1989 indictment charge Emanuele Adamita, a defendant in both cases, with narcotics transactions. Some of the overt acts are repeated word for word in both indictments. Third, overt acts 54 and 55 of the 1989 indictment allege that two defendants in Romano I, who are named co-conspirators in the 1989 indictment, discussed and executed the delivery of a kilogram of cocaine to Concord Furniture,

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Matteo Romano's furniture store on 18th Avenue in Brooklyn.

This significant overlap of factual events draws the Court's attention to the close relationship between the two alleged conspiracies. However, a close examination of the 1989 indictment shows that the great bulk of the acts alleged by the government, and the evidence it intends to introduce at trial, have not yet been brought before a jury. Some of the most significant chunks of alleged conspiratorial activity not part of Romano I are all of the pre-1985 narcotics transactions, the commencement of cocaine transactions involving Florida sources (overt acts 35-40), the escape of Emanuele Adamita from immigration detention in Florida (overt acts 41-47), Romano's narcotics transactions involving co-conspirator Paolo Rizzuto in December 1987 and January 1988 (overt acts 64-68), and the extensive use of the Caffe Giardino for narcotics transactions after the final Romano I indictment had been handed down (overt acts 86-172). Both the large absolute number of alleged conspiratorial activities not considered in Romano I, and that number relative to the activities which were considered in Romano I, suggest to the Court that the two conspiracies are different for double jeopardy purposes.

[6] The Court believes that this case presents a slightly closer case than the comparison between the Reiter II and Reiter III conspiracies in *United States v. Reiter, supra,* 848 F.2d 336, discussed in detail above with regard to defendant Gambino's double jeopardy motion. There is undoubtedly a connection between the two conspiracies. Yet current caselaw, most specifically the totality of the circumstances approach set out in *Korfant* and

Reiter, allows the government to proceed with a subsequent conspiracy prosecution even when there is some overlap with a prior trial. Given the large scale of organized crime at this time, it would be impractical for our concept of "one conspiracy" to be so broad as to block subsequent prosecutions when any connection between conspiracies can be shown by the defense. Therefore, defendant Romano's motion to dismiss the first two counts of the indictment against him on double jeopardy grounds is denied.

B. Double Jeopardy Motion as to Count Seven

[7] Count seven of the indictment charges a RICO conspiracy under 18 U.S.C. § 1962. The count alleges that the defendants acted together as an enterprise as defined in 18 U.S.C. § 1961(4) and committed 42 predicate acts of racketeering. Defendant Romano is mentioned in 9 of the 42 alleged predicate acts. He argues that these 9 acts "almost exclusively involve conduct previously at issue in the 21 U.S.C. 846 conspiracy prosecuted in *United States v. Adamita, et al.* (Romano I)." (Defendant Romano's memorandum of law at 34). Romano claims that under the double jeopardy clause, these acts cannot be used as predicate offenses against him in a subsequent RICO prosecution. The government contests Romano's characterization of count seven of the indictment, arguing that the predicate acts allege significant criminal activity by Romano not considered in Romano I.

Though the Second Circuit has not yet reached the issue, several other circuits have held that the RICO statute creates a separate offense for double jeopardy

purposes. See *United States v. Hartley,* 678 F.2d 961, 992 (11th Cir.), *cert. denied,* 459 U.S. 1170, 103 S.Ct. 815, 74 L.Ed.2d 1014 (1983); *United States v. Aleman,* 609 F.2d 298, 306 (7th Cir.), *cert. denied,* 445 U.S. 946, 100 S.Ct. 1345, 63 L.Ed.2d 780 (1980); *United States v. Rone,* 598 F.2d 564, 571 (9th. Cir. 1979). The Second Circuit has held, however, that cumulative sentencing under 21 U.S.C. § 846 and the RICO statute is not violative of double jeopardy. *United States v. Thomas,* 757 F.2d 1359 (2d Cir.), *cert. denied, sub nom. Fisher v. United States,* 474 U.S. 819, 106 S.Ct. 66, 88 L.Ed.2d 54 (1985) (citing *Blockburger v. United States,* 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932)). Judge Newman's dissent in *Thomas,* on the other hand, opposed the imposition of cumulative sentencing on the grounds that a violation of § 846 could under certain circumstances be viewed as a lesser included offense of a § 1962 RICO conspiracy. *Thomas, supra,* 757 F.2d at 1373. Romano argues that when the factual basis for the § 846 and § 1962 violations are similar, a court should consider the § 846 violation as a lesser included offense of the § 1962 charge, and thus bar a subsequent § 1962 prosecution on double jeopardy grounds.

In *United States v. Persico,* 774 F.2d 30, 32 (2d Cir.1985), the Second Circuit held that prior substantive acts for which the defendants had been convicted could serve as predicate acts in a subsequent RICO indictment. In *Persico,* however, other of the alleged predicate acts had taken place after the defendants had entered guilty pleas in the prior lawsuit. The Second Circuit specifically refused to state that continued post-plea involvement in a criminal enterprise was necessary to avoid a double

jeopardy bar to a subsequent RICO prosecution.[13] In a subsequent proceeding, the Second Circuit again refused to create such a requirement. *United States v. Persico,* 832 F.2d 705, 711 (2d Cir.), *cert. denied,* 486 U.S. 1022, 108 S.Ct. 1995, 100 L.Ed.2d 227 (1988).[14]

In the case at bar, however, the Court finds upon its own examination of count seven of the indictment, significant criminal activity allegedly carried out by Romano was not considered in Romano I. Thus the Court need not decide whether substantive narcotics charges and RICO charges will always be distinct for double jeopardy purposes. The predicate acts in count seven charge criminal activity by Romano both before and after the scope of the conspiracy alleged in Romano I. For example, predicate act five relates to a 1982 heroin distribution by Romano to Filippo Ragusa; predicate act seventeen charges a 1987 heroin distribution by Romano to Candela; predicate act thirty-three charges Romano's involvement with a bribery scheme by which Emanuele

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13. The District Court had stated that "there could be serious double jeopardy problems" if no post-plea or post-conviction predicate acts were charged in the indictment. *United States v. Persico,* 620 F.Supp. 836, 843 (S.D.N.Y. 1985) (Keenan, J.).

14. *See also Garrett v. United States,* 471 U.S. 773, 791-95, 105 S.Ct. 2407, 2417-20, 85 L.Ed.2d 764 (1985) (in a case where the defendant was first convicted for a substantive narcotics law violation and then prosecuted for engaging in a continuing criminal enterprise under 21 U.S.C. § 843 using the prior conviction as a predicate act, the Court did not reach the issue of whether continued post-conviction violation of § 848 is necessary to avoid a double jeopardy bar). In concurrence, Justice O'Connor stated: "Certainly the defendant's interest in finality would be more compelling where there is no indication of continuing wrongdoing after the first prosecution." *Id.* at 799, 105 S.Ct. at 2422.

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Adamita escaped from immigration detention in Florida; and predicate acts thirty-four and thirty-six charge Romano with extortion and threats of murder. Thus five of the nine predicate acts allege activities not considered before in a judicial proceeding against Romano. In addition, predicate acts one and two allege the fourteen-year importation and distribution conspiracies which the Court has found do not violate the double jeopardy clause. Therefore, only two of the nine predicate acts which mention Romano have been considered in judicial proceedings before, one during Romano I and one for which Romano was tried and convicted in a 1982 trial in the Eastern District of New York. Given these factual circumstances, the Court finds that prosecution of Romano under count seven of the pending indictment does not violate the double jeopardy clause.

3. Defendant Adamita's Motions

Defendant Emanuele Adamita moves the Court to dismiss the indictment against him under the double jeopardy clause, and to sever him from the other defendants for trial. The Court will consider the double jeopardy motions in this section and the severance motion in the section *infra.* Adamita argues that his indictment with Giuseppe Gambino in 1980 in the Eastern District of New York, his conviction for narcotics dealing in 1980 in Italy, and his indictment in 1985 in *United States v. Adamita, et al.,* SS 88 Cr. 217 (JES), create a double jeopardy bar to his prosecution under the 1989 indictment.

At the outset, the Court notes that double jeopardy protection only attaches when there has been a final conviction or acquittal in the first prosecution. *Richardson*

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v. United States, 468 U.S. 317, 325, 104 S.Ct. 3081, 3086, 82 L.Ed.2d 242 (1984) ("[T]he protection of the Double Jeopardy Clause by its terms applies only if there has been some event, such as acquittal, which terminates the original jeopardy." (citations omitted)). Thus the Court does not consider that Adamita's motions based on his mere indictments in the Eastern District in 1980 and the Southern District in 1985 create any double jeopardy obstacles to prosecution under the pending indictment. Adamita was never tried with Gambino under the 1980 indictment, because he was a fugitive. Adamita pled guilty to four counts of the 1985 Southern District indictment and then withdrew his guilty pleas to three of the counts. The fourth count, for which Adamita was sentenced, is not detailed by counsel for defendant Adamita, and the Court assumes that it has no bearing on Adamita's double jeopardy motions. Thus the Court will consider in detail only the double jeopardy effects of Adamita's 1980 conviction in Italy.

The narcotics transaction for which Adamita was convicted and incarcerated in Italy is identical to that which is set out in overt acts 11-18 in the 1989 indictment. This is the same heroin importation plot for which Adamita was indicted in 1980 in the Eastern District of New York, and for which Giuseppe Gambino was tried and acquitted in 1981. Adamita argues that his conviction in Italy should block his prosecution under the 1989 indictment.

Adamita argues that 18 U.S.C. § 4111 provides him with double jeopardy protection as if he had been tried

previously in a United States federal court.[15] This statute has been interpreted as affording the same protection to criminal defendants as the double jeopardy clause of the fifth amendment. *United States v. Fontanez,* 869 F.2d 180, 183 (2d Cir.1989); *United States v. Patterson,* 812 F.2d 1188, 1191 (9th Cir.), *cert. denied,* 485 U.S. 922, 108 S.Ct. 1093, 99 L.Ed.2d 255 (1985). However, the protection of § 4111 can only be invoked when a defendant has been transferred to the United States pursuant to a prisoner exchange treaty. 18 U.S.C. § 4100(a). Adamita makes no suggestion that he was transferred to the United States under any such treaty. In fact, the government alleges that he escaped to the United States when on leave from prison in Italy.

[8] The government argues that Adamita's subsequent criminal prosecution in the United States should be permissible under the dual sovereignty doctrine, and that no double jeopardy protection from the Italian conviction should attach. Under the dual sovereignty doctrine, whenever a defendant, in a single act, violates the "peace and dignity" of two separate sovereigns by breaking the laws of each, he commits two distinct offenses. See *Heath v. Alabama,* 474 U.S. 82, 88, 106 S.Ct. 433, 437, 88 L.Ed.2d 387 (1985); *Abbate v. United States,*

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15. Section 411 provides in part that:

> An offender transferred to the United States shall not be detained, prosecuted, tried, or sentenced by the United States, or any State thereof for any offense the prosecution of which would have been barred if the sentence upon which the transfer was based had been by a court of the jurisdiction seeking to prosecute the transferred offender, ...

359 U.S. 187, 193-94, 79 S.Ct. 666, 669-70, 3 L.Ed.2d 729 (1959). The Court is aware of no case, however, which applies the dual sovereignty doctrine to subsequent prosecutions by different independent nations.

Whether or not Adamita is deserved of double jeopardy protection stemming from his Italian conviction, application of the doctrine to Adamita's case would mandate nearly identical conclusions as the Court reached with regard to Giuseppe Gambino above. Even assuming that the Italian trial covered the same events in overt acts 13-18, while Gambino's 1981 trial only covered the events in overt acts 13-15, the Court must rule that Adamita's prosecution under the pending indictment should not be barred under the double jeopardy clause. A detailed application of the *Korfant* factors to Adamita's motion would be similar as to Gambino's motion. The Court will not repeat the analysis here.

[9] Defendant Adamita has asked to join in the motions made by his co-defendants, and thus the Court will consider the potential collateral estoppel effects of Adamita's 1980 conviction in Italy. Adamita has not explicitly argued the existence of a collateral estoppel bar to introduction of evidence of the 1980 drug transaction allegedly carried out by Adamita, Giuseppe Gambino, government informant Frank Rolli, and other named co-conspirators. The only description which counsel for Adamita gives the Court with regard to the Italian proceedings is the following:

> In Italy, in 1980, the defendant, Emanuele Adamita, was charged with the following: crimes of common association to commit crimes, association to commit crimes aimed at drug trafficing [sic], and possession

> of 40.610 kg. of heroin. He was convicted of all charges and incarcerated from 1980 to 1987. This same matter is contained in the case at bar in the sections entitled: "The February-March Plot to Smuggle 7 kilograms of Heroin," and "The Planned Importation is Increased to 40 kilograms."

Defendant Adamita's memorandum of law at 2. Aside from one reference equating the Italian charges to United States conspiracy and RICO law, *id.* at 4, there is absolutely no attempt to make a detailed showing as to what the 1980 Italian conviction means in collateral estoppel terms. As stated above with regard to defendant Gambino, a defendant bears the heavy burden of establishing what the first jury necessarily decided. *United States v. Clark, supra,* 613 F.2d at 400; *United States v. Nenadich, supra,* 689 F.Supp. at 292. There is no attempt made by Adamita's counsel to bear this important burden. For example, Adamita's counsel makes no effort to show the Court whether the nature of the Italian charges would block subsequent prosecution for conspiring to import or distribute, or engaging in a RICO enterprise. Thus the government is free to introduce proof of the alleged 1980 drug transaction in its case against Emanuele Adamita.

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II. SEVERANCE

All the defendants except for Giuseppe Gambino and Matteo Romano have moved the Court for severance from the main trial and thus an individual prosecution.[16] Rather than deal with defendants' severance motions on an individual basis, the Court will first lay out the general legal framework it intends to follow, and will then discuss and justify its decision as to how to try the defendants. The Court believes that this approach is proper due to the repetitiveness of many of the arguments for and against severance, and due to the macro-level case management concerns recently set out by the Second Circuit in *United States v. Casamento,* 887 F.2d 1141 (2d Cir. 1989).

As an initial matter, the Court notes that motions to sever under Fed.R.Crim.P. 14 are "committed to the sound discretion of the trial judge," and that it is a defendant's "heavy burden" to:

> show facts demonstrating that he will be so severely prejudiced by a joint trial that it would in effect deny him a fair trial. The defendant must demonstrate that he suffered such prejudice as a result of joinder, not that he might have had a better chance for acquittal at a separate trial.

United States v. Chang An-Lo, 851 F.2d 547, 556 (2d Cir.1988) (citations omitted). See also *United States v.*

16. Defendant Salvatore D'Amico did not file any motions. As will be discussed below, however, the Court has chosen to sever him from defendants Gambino and Romano, the only others not requesting severance.

Nersesian, 824 F.2d 1294, 1303 (2d Cir.), *cert. denied,* 484 U.S. 957, 108 S.Ct. 355, 98 L.Ed.2d 380 (1987) (burden of showing substantial prejudice amounting to a "miscarriage of justice"); *United States v. Bari,* 750 F.2d 1169, 1177 (2d Cir.), *cert. denied sub nom. Benfield v. United States,* 472 U.S. 1019, 105 S.Ct. 3482, 87 L.Ed.2d 617 (1985); *United States v. Wilkinson,* 754 F.2d 1427, 1435 (2d Cir.), *cert. denied sub nom. Shipp v. United States,* 472 U.S. 1019, 105 S.Ct. 3482, 87 L.Ed.2d 617 (1985); *United States v. Potamitis,* 739 F.2d 784, 791 (2d Cir.), *cert. denied,* 469 U.S. 934, 105 S.Ct. 332, 83 L.Ed.2d 269 (1984).[17]

Generally, where "defendants ... are jointly indicted [they] should be jointly tried." *United States v. Ventura,* 724 F.2d 305, 312 (2d Cir. 1983). This is particularly true where the crime charged involves a common scheme or plan. See *United States v. Turoff,* 853 F.2d 1037, 1042-43 (2d Cir.1988); *United States v. Girard,* 601 F.2d 69, 72 (2d Cir.), *cert. denied,* 444 U.S. 871, 100 S.Ct. 148, 62 L.Ed.2d 96 (1979). The Supreme Court has unequivocally recognized that "[j]oint trials play a vital role in the criminal justice system." *Richardson v. Marsh,* 481 U.S. 200, 209, 107 S.Ct. 1702, 1708, 95 L.Ed.2d 176 (1987).

The Second Circuit has recently given guidance to district courts in deciding severance motions in large-scale criminal trials such as the one at bar. In *United States v. Casamento,* 887 F.2d 1141, 1152 (2d Cir. 1989), the Second Circuit ruled that the burden of proof for severance motions should switch to the prosecution when

17. Though these cases set out the appellate standard for review of district court decisions, they highlight to district courts the underlying concerns of severance motions.

certain size limitations are reached. The Court held that when the government's case will last more than four months, the prosecutor should "present a reasoned basis to support a conclusion that a joint trial of all the defendants is more consistent with the fair administration of justice than some manageable division of the case into separate trials for groups of defendants." *Id.* When the government's case will last more than four months and is brought against more than ten defendants, then the prosecutor should make "an especially compelling justification for a joint trial....~ *Id.* In making a showing for a joint trial, the court should weight the interests of the prosecution, the defendants, the jurors, the court, and the public. *Id.*

[10] The current case is brought against 15 defendants, 12 of whom are before the Court, and the government has estimated that its case will take some six months to present to the jury. Under *Casamento,* the burden is clearly on the government to show "an especially compelling justification for a joint trial." The Court holds that the government has not carried the burden of justifying a joint trial of all 12 defendants. The major theme of the government's opposition to defendants' severance motions--that all defendants have worked closely together in the same narcotics conspiracy--is insufficient to warrant a single trial.

[11] The Court does recognize, however, that group trials are in this instance superior to 12 separate trials. First, the government does indeed have an interest in prosecuting the case in a similar fashion as it was pre-

sented to the Grand Jury. Co-conspirators should be tried together whenever feasible. Second, the government and the public have an interest in as quick and efficient a resolution of the charges as possible. Contrary to the assertions of some defense counsel at oral argument, the Court believes that these goals are best achieved through group trials.[18] Third, stress on the witnesses will be lessened by minimizing the total number of trials. Keeping the number of times that certain key witnesses must repeat their testimony will also reduce the relative advantage accruing to defendants who are tried at later dates and who can benefit from knowledge of the contents and weaknesses of a witness's testimony.

The Court therefore rules that the 12 defendants before the Court pursuant to the 1989 indictment will be severed into two groups for purposes of trial. One group will consist of defendants Giuseppe Gambino, Lorenzo Mannino, Francesco Inzerillo, Matteo Romano, and Emanuele Adamita ("Group A"). The other group will consist of defendants Joseph LaRosa, Salvatore LoBuglio, Giuseppe D'Amico, Salvatore D'Amico, Francesco Cipriano, Salvatore Candela, and Carmelo Guarnera ("Group B"). The Court is, of course, unable to make a division which perfectly satisfies the principal concerns of efficiency and fairness. But it believes that this division into two groups of roughly equal size best achieves those objectives.

A major concern of the Court was to divide the defendants into groups which would minimize the quantity

18. Jury selection alone in cases of this type can be prolonged and thus add greatly to the time spent on separate trials.

of evidence not pertaining to a particular defendant which that defendant would have to sit through. Thus the Court grouped defendants depending on the extent of overlapping evidence based on the face of the indictment, especially the overt acts. Group A consists of individuals alleged to be leaders of the conspiracy and active from its start in the mid-1970s. They are the only defendants listed in the first 34 overt acts of the indictment, except for the fugitive Rosario Naimo. Overt acts 41-74, which concern Emanuele Adamita's escape from Immigration detention in Florida, his alleged return to the narcotics trade in New York, and Matteo Romano's drug trafficking, likewise mention only Group A members, except for two references to Joseph LaRosa in overt acts 56-57. Though the interaction between Group A and Group B members increases over time, Group A represents an alleged core of conspirators operating a variety of illegal enterprises out of the Caffe Giardino. Finally, the alleged acts of violence, especially the murders, were most all allegedly committed by Group A members. Though the Court is aware that certain Group A members (Francesco Inzerillo, for example) are not accused of any violent acts, division into two groups does minimize the prejudicial spillover effects of alleged acts of violence.

Group B consists of what the government refers to in overt acts 9 and 10 as "secondary wholesale distributors" or those who "oversaw and facilitated the transportation, smuggling and storage of multiple kilogram quantities of narcotics...." Group B generally has less cohesion than Group A in terms of overlapping evidence. Yet the Court is unwilling to divide into even smaller trials a group of individuals who were found by the Grand Jury as partici-

pating together in a single narcotics conspiracy. The division made by the Court should significantly reduce the time spent by certain defendants listening to evidence with no relation to their case, and minimize the prejudicial spillover effects of being tried in one large group.

III. OTHER MOTIONS

1. Motions to Dismiss for Duplicity and Multiplicity

[12] Defendants Joseph LaRosa and Salvatore LoBuglio move the Court to dismiss the first two counts of the indictment as being duplicitous and multiplicitous. First, the defendants argue that the first two counts of the indictment charge more than one conspiracy and that they are therefore duplicitous. Second, they argue that since the first two counts refer to identical transactions, it would violate the rule against multiplicitous charges by subjecting a defendant to prosecution under both counts. Each of these arguments will be considered in turn.

Under Fed.R.Crim.P. 7(c), the government is permitted to charge one or more specified means of committing a criminal offense in a single count of an indictment. Rule 7(c) allows that two or more acts, each of which would constitute an offense standing alone, may be joined in a single count where "the offenses joined bear a relationship to one another and may be said to constitute a continuing course of conduct...." *United States v. Pavloski,* 574 F.2d 933, 936 (7th Cir. 1978). A count of an indictment should only be ruled impermissibly duplicitous when the policy goals underlying the doctrine are offended--to wit, if a general verdict of guilty might

actually conceal contrary findings as to different alleged crimes, or if an appropriate basis for sentencing is not provided. *United States v. Margiotta,* 646 F.2d 729, 732-33 (2d Cir.1981).

Defendants LaRosa and LoBuglio argue that their extremely minor roles in the alleged conspiracies demonstrate by necessity the existence of more than one conspiracy. It is true that neither defendant is mentioned in any overt act occurring before 1986. The government argues in response that the two defendants are contesting "what is strictly a matter of proof, not pleading." Government memorandum of law at 140. The Court agrees that in this case, the government should be permitted to go to trial on the pending indictment. Only after the Court has been made more aware of the evidence will it be in a position to decide whether counts one and two are impermissibly duplicitous.

The government is not allowed to divide into two or more counts what should have properly been charged in a single count. To allow the government to bring multiple counts where only one should have been charged would unfairly affect the defendant at sentencing. The test for determining whether two offenses are sufficiently distinct to allow the government to bring separate charges under different statutes is set forth in *Blockburger v. United States,* 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932):

> The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not....

See Albernaz v. United States, 450 U.S. 333, 337-38, 101 S.Ct. 1137, 1141-42, 67 L.Ed.2d 275 (1981); *United States v. Biasucci,* 786 F.2d 504, 515-16 (2d Cir.), *cert. denied,* 479 U.S. 827, 107 S.Ct. 104, 93 L.Ed.2d 54 (1986). The rule is clearly set that conspiracies to import and distribute narcotics are properly charged separately. See *United States v. Benevento,* 836 F.2d 60, 72 (2d Cir. 1987). Even when the overt acts pertaining to one conspiracy are incorporated into the charge for a second conspiracy, the charges are properly brought separately.

2. Defendant LoBuglio's Suppression Motion

[13] Salvatore LoBuglio moves the Court to suppress physical evidence seized from his home on December 1, 1988 pursuant to a warrant issued by Judge Mark A. Costantino. LoBuglio argues that while the warrant stated that the affiant, Special Agent John G. Nemec, Jr., had reason to believe that evidence related to illegal drug transactions were hidden at LoBuglio's home, a close examination of the supporting affidavit reveals no such basis for a finding of probable cause to search LoBuglio's home.

Special Agent Nemec's affidavit describes LoBuglio's associations with alleged mafia members and his familial relationship to two convicted heroin dealers. More specifically, the affidavit sets forth the facts of LoBuglio's meetings, conversations and heroin transactions with an undercover agent working out of Buffalo, New York, and LoBuglio's frequentings of the Caffe Giardino. Special Agent Nemec details his experience as an FBI Special Agent assigned to the Organized Crime Drug

Appendix C
Opinion of United States District Court

Enforcement Task Force and states that his belief is based on his "training, experience, participation in other narcotics investigations, and discussions with other narcotics investigators."

To be valid, a search warrant must be supported by a showing of probable cause that evidence of criminal activity will be found during the search. "[P]robable cause requires only a probability or substantial chance of criminal activity, not an actual showing of such activity." *Illinois v. Gates,* 462 U.S. 213, 244 n. 13, 103 S.Ct. 2317, 2335 n. 13, 76 L.Ed.2d 527 (1983). The belief that there is probable cause need not "be correct or more likely true than false." *Texas v. Brown,* 460 U.S. 730, 742, 103 S.Ct. 1535, 1543, 75 L.Ed.2d 502 (1983); *United States v. Travisano,* 724 F.2d 341, 346 (2d Cir. 1983). "The process does not deal with hard certainties, but with probabilities .... [T]he evidence must be seen and weighed not in terms of library analysis by scholars, but as understood by those versed in the field of law enforcement." *Texas v. Brown, supra,* 460 U.S. at 472, 103 S.Ct. at 1543.

The Court hereby finds that Special Agent Nemec's affidavit did provide probable cause for Judge Costantino's issuance of the search warrant for defendant LoBuglio's home. First-hand knowledge of the fact that evidence of drug trafficking was to be found at LoBuglio's residence was not necessary for the warrant to issue. Rather, Judge Costantino had to decide, based on Special Agent Nemec's affidavit, that under the totality of the circumstances, probable cause existed that evidence of criminal activity would be found at LoBuglio's home. See *Illinois v. Gates, supra,* 462 U.S. at 241, 103 S.Ct. at 2333. What was known about LoBuglio at that time, coupled with his relationship

to organized crime family members, provided this probable cause. Defendant LoBuglio's motion to suppress the evidence seized from his home on December 1, 1988 is denied.

CONCLUSION

Defendant Giuseppe Gambino's motions to dismiss the first, second, and third counts of the indictment against him on double jeopardy grounds are denied. Defendant Gambino's motion to bar the government from introducing evidence of the 1980 heroin importation scheme, alleged in overt acts 11-18, to prove count one of the indictment against him on collateral estoppel grounds is granted. Defendant Gambino's motion to bar the government from introducing evidence of the 1980 heroin importation scheme, alleged in overt acts 11-18, to prove count two of the indictment against him is denied.

Defendant Matteo Romano's motions to dismiss counts one, two, and seven of the indictment against him are denied.

Defendant Emanuele Adamita's motions to dismiss the indictment against him on double jeopardy grounds is denied.

Pursuant to the severance motions of defendants Lorenzo Mannino, Emanuele Adamita, Francesco Inzerillo, Joseph LaRosa, Salvatore LoBuglio, Giuseppe D'Amico, Francesco Cipriano, Salvatore Candela, and Carmelo Guarnera, the defendants will be divided into two groups for trial. One group will consist of defendants Giuseppe Gambino, Lorenzo Mannino, Francesco Inzerillo, Matteo Romano, and Emanuele Adamita. The other group will

consist of defendants Joseph LaRosa, Salvatore LoBuglio, Giuseppe D'Amico, Salvatore D'Amico, Francesco Cipriano, Salvatore Candela, and Carmelo Guarnera.

The motions of defendants Joseph LaRosa and Salvatore LoBuglio to dismiss the first two counts of the indictment against them on the grounds of duplicity and multiplicity are denied.

Defendant Salvatore LoBuglio's motion to suppress physical evidence seized from his home pursuant to a warrant on December 1, 1988 is denied.

SO ORDERED.

Supreme Court, U.S.
FILED
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(2)

No. 90-1689

In the Supreme Court of the United States

OCTOBER TERM, 1991

GIUSEPPE GAMBINO, AKA JOE, AND MATTEO ROMANO,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether, under the doctrine of collateral estoppel, petitioner Gambino's previous acquittal on a drug conspiracy charge bars the government from introducing any evidence of the drug conspiracy in support of the instant CCE and RICO conspiracy charges against Gambino.

2. Whether the CCE count against Gambino is barred by the Double Jeopardy Clause because of his previous acquittal on the drug conspiracy charge.

3. Whether the RICO conspiracy count against both petitioners is barred by the Double Jeopardy Clause because of their previous acquittals on drug conspiracy charges.

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In the Supreme Court of the United States

OCTOBER TERM, 1991

No. 90-1689

GIUSEPPE GAMBINO, AKA JOE, AND MATTEO ROMANO, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-16a) is reported at 920 F.2d 1108. The order and opinion of the district court (Pet. App. 19a-66a) is reported at 729 F. Supp. 954.

JURISDICTION

The judgment of the court of appeals was entered on December 10, 1990. The petition for rehearing was denied on February 1, 1991. Pet. App. 17a-18a. The petition for a writ of certiorari was filed on May 2, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

On August 30, 1989,[1] a grand jury sitting in the United States District Court for the Southern District of New York returned a seven-count indictment against 15 defendants. The indictment charged petitioner Gambino with, *inter alia*, conspiring to import heroin and cocaine, in violation of 21 U.S.C. 963 (Count 1); conspiring to distribute or to possess with intent to distribute heroin and cocaine, in violation of 21 U.S.C. 846 (Count 2); conducting a continuing criminal enterprise, in violation of 21 U.S.C. 848 (Count 3); and conspiring to participate in the affairs of an enterprise through a pattern of racketeering activity, in violation of the RICO statute, 18 U.S.C. 1962(d) (Count 7). The indictment charged petitioner Romano with RICO conspiracy but not with CCE.[2] Petitioners subsequently moved to dismiss the various counts on double jeopardy grounds, and the district court denied the motion. Pet. App. 19a-66a. Petitioners took an interlocutory appeal. The court of appeals reversed the denial of Gambino's motion to dismiss Counts 1 and 2, and remanded for a determination whether to dismiss those

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[1] Both courts below mistakenly stated that the indictment was returned on December 14, 1989. See Pet. App. 5a, 21a. The original indictment was returned on December 14, 1988, but the sixth superseding indictment, on the basis of which this appeal was taken, was returned on August 30, 1989. Gambino C.A. App. 9.

[2] Romano was also originally charged in Counts 1 and 2, but, during the pendency of this appeal, the case was remanded to the district court on the government's motion to enable the government to move to dismiss those counts as to Romano. Pet. App. 3a, 5a.

counts or to order redaction of the offending portions of the indictment. In all other respects, the court of appeals affirmed. Pet. App. 1a-16a.

1. The instant case involves an international narcotics business that operated for almost 20 years. Count 1, the drug importation conspiracy count, alleges a conspiracy to smuggle heroin and cocaine into this country. Count 1 lists 172 overt acts, including specific narcotics transactions, meetings, and communications between the defendants and their coconspirators. Gambino is named in 41 of those overt acts, including two relating to his participation in a March 1980 heroin importation scheme. See Count 1, Overt Acts 13, 14. Count 2, the drug distribution conspiracy count, incorporates the overt acts charged in Count 1. See Count 2 para. 5. Count 3, the CCE count, alleges that Gambino supervised a continuing criminal enterprise from January 1, 1975, to the date of the indictment, and it incorporates the conspiracy violations alleged in Counts 1 and 2 as predicate drug offenses. See Count 3 para. 1.

The RICO conspiracy count, Count 7, alleges a pattern of racketeering consisting of 42 predicate acts, including narcotics transactions, bribery, extortion, gambling, murder, and obstruction of justice. Those offenses were alleged to have occurred between January 1, 1970, and the date of the indictment. The drug conspiracies charged in Counts 1 and 2 account for two of the predicate acts of racketeering alleged against Gambino. See Count 7, Racketeering Acts 1 and 2.[3] Gambino was charged with 21 additional

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[3] The government dismissed the narcotics conspiracy charges against Romano, which resulted in the deletion of Romano's name from the RICO predicate acts corresponding to Counts 1 and 2. Pet. App. 5a.

predicate acts, including four murders, and Romano was charged with ten predicate acts.

2. Previously, in 1981, Gambino was acquitted of charges that he conspired, between August 1, 1979, and March 18, 1980, to import heroin into the United States. The government's evidence in that case consisted primarily of testimony from Frank Rolli, a government informant, who penetrated the alleged conspiracy of Gambino and co-defendant Emanuele Adamita to import heroin from Italy to the United States. Rolli testified that he met with Gambino and Adamita in Brooklyn on two occasions in March 1980; that the three men discussed a plan to smuggle ten kilograms of heroin through customs at Kennedy Airport; that Gambino agreed to pay him $30,000 for his assistance; that Rolli and Adamita traveled to Italy to obtain the heroin; and that, while they were in Italy, the amount of heroin to be imported increased from ten to 40 kilograms. Pet. App. 3a-4a. The plot was foiled when the heroin was seized, but the two March 1980 meetings were charged as overt acts 13 and 14 in Counts 1 and 2 of the instant indictment.

3. In 1989, Romano was acquitted of conspiring to import and distribute heroin and cocaine. The indictment in that case alleged that Romano and 26 others conspired to import narcotics from Italy to the United States between January 1, 1985, and June 30, 1988. The indictment charged 105 overt acts, including the use of couriers to transport cocaine to Italy in order to exchange the cocaine for heroin and return the heroin to the United States. The indictment also alleged that legitimate businesses, including pizza parlors and a clothing store, were used as fronts to distribute the narcotics. Romano was named in four overt acts alleging meetings with co-defendant

Adamita. Pet. App. 4a-5a. Gambino was not charged in that indictment.

4. Petitioners filed pretrial motions to dismiss the counts against them in the present indictment on double jeopardy grounds.[4] First, the district court rejected Gambino's contention that the drug conspiracy counts (Counts 1 and 2) violated the Double Jeopardy Clause in light of his previous acquittal of drug conspiracy in 1981. In so doing, the court applied the totality of the circumstances test of *United States* v. *Korfant*, 771 F.2d 660 (2d Cir. 1985), to determine whether the earlier- and later-charged conspiracies were the same. Pet. App. 28a-31a, 37a. The court concluded that there was "insufficient similarity" between the conspiracies to warrant dismissal. *Id.* at 29a. In particular, the court relied on the following factors: that only two of the 41 overt acts charged against Gambino in Counts 1 and 2 concern events covered in the 1981 trial, *id.* at 30a; that Counts 1 and 2 contain detailed allegations of drug activity having no relation to the earlier charges, *ibid.*; that some of the events alleged in Counts 1 and 2 occurred after the 1981 acquittal, *ibid.*; that, apart from Gambino and a government informant, only one of the 15 defendants and 27 co-conspirators named in the instant indictment was involved in the 1981 case, *ibid.*; and that the 1981 case involved an importation conspiracy, whereas the Count 2 conspiracy in this case charges a distribution conspiracy, *id.* at 37a.

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[4] In the district court, Gambino mounted double jeopardy challenges only to Counts 1, 2, and 3; he did not challenge Count 7, the RICO conspiracy count. The court of appeals nonetheless addressed Gambino's argument, made for the first time in that court, that Count 7 too was jeopardy-barred. See Pet. App. 14a n.2.

Although ruling against Gambino on the double jeopardy claim, the court agreed with Gambino that, in proving the Count 1 importation conspiracy, the government should be barred, on grounds of collateral estoppel, from introducing evidence of Gambino's alleged involvement in the 1980 importation scheme. Pet. App. 35a. The court concluded that "the 1981 jury simply did not believe that the government had sustained its burden of proving Gambino's guilt beyond a reasonable doubt." *Id.* at 36a. With respect to the Count 2 distribution conspiracy, however, the court declined to bar the government from proving the 1980 importation scheme. The court concluded that the 1981 jury's acquittal of Gambino on the importation conspiracy charge did not amount to a finding that he did not conspire to distribute narcotics. *Id.* at 38a.

The court then rejected Gambino's contention that the CCE count violates the Double Jeopardy Clause because of its inclusion of the Count 1 and 2 conspiracies as predicate drug offenses. Having refused to dismiss either of the drug conspiracy counts on double jeopardy grounds, the court concluded that the CCE count need not be dismissed either. Pet. App. 39a.

Finally, the court rejected Romano's argument that his 1989 acquittal precluded prosecution on the RICO conspiracy count. Finding that only one of the predicate racketeering acts alleged against Romano had been considered in the earlier conspiracy prosecution, the court held that the RICO conspiracy count did not constitute the same offense as the 1989 narcotics conspiracy charge, and that the RICO conspiracy prosecution therefore did not violate the Double Jeopardy Clause. Pet. App. 50a-51a.

5. Petitioners took an interlocutory appeal under *Abney* v. *United States*, 431 U.S. 651 (1977), renewing their double jeopardy claims.[5] The court of appeals held, first, that the district court's double jeopardy analysis with respect to Counts 1 and 2 was incorrect. Pursuant to the "same conduct" test adopted in *Grady* v. *Corbin*, 110 S. Ct. 2084 (1990), the court of appeals held that "the *Korfant* factors applied by the district court [were] inadequate to satisfy double jeopardy concerns," and that, because of the Double Jeopardy Clause, the overt acts for which Gambino had previously been prosecuted "[could] not remain in [Counts 1 and 2]." Pet. App. 12. Accordingly, the court vacated the district court's order and remanded for that court to determine whether to dismiss Counts 1 and 2 or to redact the offending overt acts. *Ibid.*[6]

The court of appeals upheld the denial of the motions to dismiss the CCE and RICO conspiracy counts. The court relied on the holding in *Garrett* v. *United States*, 471 U.S. 773 (1985), that "it does not violate the Double Jeopardy Clause . . . to prosecute [a] CCE offense after a prior conviction for one of the predicate offenses." Pet. App. 13a, quoting *Garrett*, 471 U.S. at 793. The court concluded that "[t]his case presents just such a situation because several of the predicate acts constituting the CCE charged against Gambino and the RICO conspiracy charged against Gambino and Romano occurred after their previous

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[5] The government did not take an appeal from the exclusion of evidence of the 1980 importation scheme to prove Count 1.

[6] We have filed a petition for a writ of certiorari as to this aspect of the Second Circuit's decision, asking that the petition be held and disposed of in light of this Court's disposition of our petition for a writ of certiorari in *United States* v. *Felix*, No. 90-1599.

prosecutions." Pet. App. 14a. The court held that *Grady*, having cited *Garrett* with "apparent approval," did "not disturb this rationale." *Id.* at 15a.

ARGUMENT

1. The CCE and RICO conspiracy counts against Gambino each allege as predicate acts the Count 1 drug importation conspiracy and the Count 2 drug distribution conspiracy. Count 1 and Count 2 each name Gambino in two overt acts relating to the 1980 heroin importation scheme. Gambino contends (Pet. 11-13) that, under the doctrine of collateral estoppel, his acquittal on the importation conspiracy charge arising out of that scheme bars the government from proving the scheme in support of the CCE and RICO conspiracy counts.

Gambino's collateral estoppel claims do not warrant further review at this time. First, neither court below expressly ruled on whether the government could introduce proof of the 1980 scheme to establish the predicate acts corresponding to Counts 1 and 2 in the CCE and RICO conspiracy counts. The district court's discussion of the collateral estoppel issues raised by Gambino suggests that the court was unaware that Gambino intended his collateral estoppel argument to apply to the CCE and RICO conspiracy counts in addition to Counts 1 and 2, see Pet. App. 32a-37a, 38a-39a, and the court of appeals' opinion also does not reflect awareness of the intended scope of Gambino's collateral estoppel claim.[7] Gambino's collateral estoppel argument as to the CCE and

[7] The portions of Gambino's filings concerning collateral estoppel in the district court, as well as in the court of appeals, do not mention the RICO conspiracy count at all.

RICO conspiracy counts thus will remain open when the case is returned to the district court for trial.[8] There is no reason to believe that that court, if given the opportunity, will not resolve those issues appropriately. If Gambino is dissatisfied with that court's rulings, any perceived errors may be raised in an appeal from a final judgment of conviction, if he should be convicted after trial.

Second, the question whether the government may introduce evidence of the 1980 importation in support of the predicate acts in the CCE and RICO conspiracy counts corresponding to Counts 1 and 2 turns on a determination of the basis for the jury's acquittal of petitioner in 1981.[9] That fact-bound determination does not warrant further review by this Court.

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[8] In our view, the question whether proof of the 1980 importation may be introduced in support of the CCE and RICO predicate acts corresponding to Counts 1 and 2 turns entirely on whether proof of that importation may be introduced in support of Counts 1 and 2 themselves. It follows that the district court's decision to preclude proof of the 1980 conspiracy as to Count 1 would preclude the same proof as to the predicate acts corresponding to Count 1 in the CCE and RICO conspiracy counts. As to Count 2, the district court's decision not to preclude such proof currently stands unreversed. That ruling would thus permit the government to introduce evidence of the 1980 importation as to the predicate acts corresponding to Count 2 in the CCE and RICO conspiracy counts.

[9] As the district court held, Pet. App. 38a, Gambino's acquittal established *only* a failure of proof that he agreed to import heroin. The acquittal did not necessarily preclude a determination that he agreed to participate in the distribution of the heroin following its importation, and thus did not preclude proof of the 1980 importation as to Count 2. That conclusion follows from Rolli's testimony, Gov't C.A. Br. 22, that his two conversations with Gambino and Adamita were

2. Petitioner Gambino contends (Pet. 13-20) that his previous acquittal of drug importation conspiracy forecloses his prosecution on the instant CCE count. The courts below correctly rejected this claim.

a. To begin with, *Garrett* v. *United States*, 471 U.S. 773 (1985), establishes that the CCE count is not barred merely because, by charging the Count 1 and 2 drug conspiracies as predicate drug offenses, the CCE count specifically incorporates the overt acts arising from the previously prosecuted 1980 importation scheme.

In *Garrett*, this Court held that the Double Jeopardy Clause did not bar the use of a drug importation offense, for which the defendant had previously been prosecuted, as a predicate offense in a CCE prosecution. After determining that Congress intended to allow separate prosecutions for CCE and its predicate offenses, 471 U.S. at 779-786, the Court went on to express "serious doubts" that the predicate drug violations were lesser included offenses within CCE, *id.* at 790, cautioning against the "ready transposition of the 'lesser included offense' principles of double jeopardy from the classically simple situation [of a single course of conduct] to the multilayered conduct, both as to time and to place, involved in this case," *id.* at 789. Rather, the Court stated that "[q]uite obviously the CCE offense is not, in any common-sense or literal meaning of the term, the 'same' offense as

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marked by considerable disagreement about, among other things, the size and method of the importation. In light of Rolli's testimony about those conversations, it is entirely possible that the jury concluded that Gambino declined to join the charged importation conspiracy, but did not conclude that Gambino's reluctance extended to the distribution of narcotics, as charged in Count 2.

one of the predicate offenses." *Id.* at 786. Nevertheless, assuming *arguendo* that CCE and its predicate offenses are the same offense, the Court concluded that the successive prosecutions did not violate the Double Jeopardy Clause because the CCE offense continued after the date of the indictment for the predicate offense. *Id.* at 791-793.

The result in this case follows *a fortiori* from *Garrett*. First, the predicate acts here bear even less similarity to lesser included offenses of CCE than was the case in *Garrett*. While in *Garrett* the defendant had previously been prosecuted for a predicate act charged in the CCE count, in this case Gambino has never been prosecuted for either of the predicate acts at issue—the Count 1 and 2 conspiracies—but only for a conspiracy based on evidence of 2 of the 41 overt acts charged in those counts. Second, even assuming that Gambino had been previously prosecuted for the CCE predicate acts corresponding to Counts 1 and 2 and that those predicate acts were lesser included offenses of CCE, Gambino's successive prosecutions are permissible because the CCE offense, as charged, continued to the date of the instant indictment in 1989, far past the date of Gambino's 1981 indictment for the importation scheme.

b. Gambino also contends (Pet. 17-20) that, regardless of whether previously prosecuted drug offenses may generally be used as predicate acts in a CCE prosecution, the conspiracy to import drugs of which he was acquitted was a lesser included offense of the CCE offense charged in the present indictment. In *Jeffers* v. *United States*, 432 U.S. 137 (1977), a plurality of this Court assumed, without deciding, that a conspiracy to distribute drugs under 21 U.S.C. 846 is a lesser included offense of CCE, and that the government may not successively prosecute for the

two offenses. 432 U.S. at 149-150. However, the "assumption" of the *Jeffers* Court must be viewed in the context of that case, in which the CCE charge was essentially coterminous with the conspiracy charge. As the Court observed, the two drug charges in the *Jeffers* case covered "the identical agreement and transactions over the identical time period." *Id.* at 150 n.15. See *United States* v. *Grayson*, 795 F.2d 278, 285 (3d Cir. 1986), cert. denied, 481 U.S. 1018 (1987).

By contrast, as the overt acts section of the Count 1 conspiracy shows, the CCE charge in the instant case includes several drug offenses committed by Gambino in addition to the 1981 importation conspiracy, some of which occurred after the date of the 1981 indictment. In these circumstances, successive prosecutions are permissible. The *Jeffers* plurality based its assumption that drug conspiracy is a lesser included offense of CCE on the premise that the "in concert" element of a CCE offense requires proof of a conspiratorial agreement.[10] 432 U.S. at 149-150. That rationale bars successive prosecutions, however, only when the conspiracy prosecution and the CCE prosecution rest on essentially identical agreements. It does not apply where, as here, the CCE conviction encompasses both different and later joint activity. Under a contrary rule, the government would be forced to choose between prosecuting a defendant for drug conspiracy or releasing him with the idea that he would continue his drug activity so that the govern-

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[10] Under 21 U.S.C. 848(c)(2)(A), a CCE defendant must have engaged in a continuing series of drug violations "in concert with five or more other persons with respect to whom [he] occupies a position of organizer, a supervisory position, or any other position of management."

ment might catch him twice more and then be able to prosecute him under CCE—a situation the Court in *Garrett* characterized as "absurd." 471 U.S. at 785-786.

United States v. *Aguilar*, 849 F.2d 93 (3d Cir. 1988), cited by Gambino, is not to the contrary. In *Aguilar*, the court of appeals barred the defendant's CCE prosecution because of his previous conviction for drug conspiracy. But in *Aguilar*, as in *Jeffers*, the conduct underlying both offenses was the same. 849 F.2d at 94, 98. The court in *Aguilar* pronounced the rule, which is wholly consistent with our argument here, that a drug conspiracy is a lesser included offense of a CCE offense only in a case "where the same activities were the basis for each crime." *Id.* at 98. Indeed, in another Third Circuit case, *United States* v. *Grayson*, *supra*, the court held that the defendant's previous drug conspiracy prosecutions did not bar a later CCE charge because there, as here, "the CCE charge included numerous offenses both distinct from the two major conspiracy convictions as well as subsequent to the date of indictment in each of the prior cases." 795 F.2d at 285.[11]

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[11] Nor is petitioner helped by the district court decision in *United States* v. *Roman*, 646 F. Supp. 1568 (S.D.N.Y. 1986), rev'd on other grounds, 822 F.2d 261 (2d Cir.), cert. denied, 484 U.S. 954 (1987). There, in dismissing a CCE count on speedy trial grounds, the court held that the speedy trial clock began to run on the filing date of the underlying drug conspiracy charge rather than on the date of the superseding indictment charging the CCE offense, because the CCE and conspiracy charges constituted the same offense. It is not clear from the opinion in *Roman* whether the two charges rested on the same facts. In any event, to the extent that the court of appeals decision here conflicts with the district court

c. In support of his double jeopardy claim, Gambino invokes *Grady* v. *Corbin*, 110 S. Ct. 2084, 2087 (1990), in which the Court held that "the Double Jeopardy Clause bars a subsequent prosecution if, to establish an essential element of an offense charged in that prosecution, the government will prove conduct that constitutes an offense for which the defendant has already been prosecuted." *Grady*, however, does not help Gambino's cause.

First, the *Grady* test has no application in the CCE context. In *Grady*, the successive prosecutions involved simple offenses—misdemeanor traffic violations and homicide—that occurred simultaneously during a single course of conduct spanning a brief period of time. A CCE charge, by contrast, entails proof of multiple drug violations committed in furtherance of an ongoing enterprise and occurring over an extended time span. As the Court stated in *Garrett*, 471 U.S. at 788, CCE does not "lend itself to the simple analogy of a single course of conduct."

Further, *Grady* did not renounce the rule allowing successive prosecutions where, as here, the offense charged in the later case had not been completed at the time of the indictment in the earlier case. See *United States* v. *Scarpa*, 913 F.2d 993, 1013-1014 n.8 (2d Cir.), cert. denied, 111 S. Ct. 57 (1990); *United States* v. *Pungitore*, 910 F.2d 1084, 1111, 1115 & n.37 (3d Cir. 1990), cert. denied, 111 S. Ct. 2009 (1991). As noted above, that rule was established quite clearly

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decision in *Roman*, *Roman* must be regarded as overruled. See *United States* v. *Sperling*, 560 F.2d 1050, 1059 (2d Cir. 1977) ("Congress did not intend §§ 846 and 848 to be offenses separately and simultaneously punishable *where the facts on which the violations rest are the same.*") (emphasis added).

in *Garrett*—a case cited in *Grady* with apparent approval, see 110 S. Ct. at 2091, 2094 n.15—and the *Grady* Court itself expressly reaffirmed that the Double Jeopardy Clause does not bar a subsequent prosecution where "the State is unable to proceed on the [later] charge at the outset because the additional facts necessary to sustain that charge have not occurred." 110 S. Ct. at 2090 n.7.[12]

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[12] In support of his invocation of *Grady*, Gambino cites the Second Circuit decisions in *United States* v. *Calderone*, 917 F.2d 717 (2d Cir. 1990), petition for cert. pending, No. 90-1527, and *United States* v. *Russo*, 906 F.2d 77 (2d Cir. 1990). Intracircuit conflicts, however, do not warrant this Court's review. In any event, those cases do not help Gambino. *Calderone* involved successive drug conspiracy prosecutions, not CCE or RICO conspiracy. *Calderone* thus did not raise any question concerning separate prosecution for CCE or RICO and predicate acts of those offenses, as does this case. In *Russo*, the Second Circuit accepted the government's concession that, on the facts of that case, *Grady* barred a prosecution for conduct that had been charged as predicate acts in an *earlier* RICO prosecution.

Nor do we believe that this petition should be held pending disposition of the government's petition in *United States* v. *Felix*, 926 F.2d 1522 (10th Cir. 1991), petition for cert. pending, No. 90-1599. Like *Calderone*, *Felix* does not involve a CCE or RICO conspiracy charge, but instead concerns the question whether the government may prosecute a defendant for substantive criminal conduct, and then, in a separate prosecution for conspiracy, ask the jury to infer the conspiratorial agreement in part from that same substantive criminal conduct. Because it is based on the view that the conduct at issue in a conspiracy prosecution is that conduct from which the government asks the jury to infer the conspiratorial agreement, *Felix* is relevant to the Second Circuit's holdings barring prosecution of Gambino on Counts 1 and 2. Accordingly, we have filed a petition for a writ of certiorari asking the Court to dispose of the Second Circuit's holdings as to Counts

Finally, even if *Grady* applied with full force to predicate acts charged in a CCE prosecution, Gambino's argument would be meritless. *Grady* bars a prosecution only when evidence of previously prosecuted conduct would "establish an essential element" of the offense charged in the later prosecution. 110 S. Ct. at 2087. Although proof of the 1980 importation would provide some evidence of the predicate acts corresponding to the Count 1 and 2 conspiracies and may be relevant in proving the existence of an "enterprise," proof of the importation alone could hardly be said to "establish" any essential element of the CCE offense charged.

3. Both petitioners contend (Pet. 13-16, 21-26) that their previous acquittals on drug conspiracy charges foreclose the instant RICO conspiracy count.

a. The courts of appeals to address the issue have uniformly held that the Double Jeopardy Clause permits successive prosecutions for non-RICO conspiracy and RICO conspiracy, even when the government uses some of the same evidence concerning the defendant's actions to prove both conspiracies. *E.g.*, *United States* v. *Gonzalez*, 921 F.2d 1530 (11th Cir. 1991), petition for cert. pending, No. 90-7857; *United States* v. *Scarpa*, 913 F.2d at 1013-1014; *United States* v. *Grayson*, 795 F.2d at 282-283; *United States* v. *Schell*, 775 F.2d 559, 568 (4th Cir. 1985), cert. de-

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1 and 2 in light of its disposition of *Felix*. See note 5, *supra*. The present petition, however, involves the propriety of separate prosecution for CCE and RICO conspiracy and for predicate acts named in the CCE and RICO conspiracy charges. This Court's disposition of *Felix* is therefore unlikely to alter the analysis of the counts at issue in this petition.

nied, 475 U.S. 1098 (1986); *United States* v. *Watchmaker*, 761 F.2d 1459, 1466-1468 (11th Cir. 1985); *United States* v. *Brooklier*, 637 F.2d 620 (9th Cir. 1980), cert. denied, 459 U.S. 1206 (1983). Cf. *Garrett* v. *United States*, 471 U.S. at 786, 789-790 (suggesting that complex offenses like RICO are not the "same offense" for double jeopardy purposes as their underlying predicate acts). The court of appeals' decision that petitioners' previous acquittals on drug conspiracy charges does not preclude later prosecution for RICO conspiracy thus comports fully with all prior federal appellate precedent.[13]

b. Even if a non-RICO conspiracy prosecution could in some instances preclude a subsequent RICO conspiracy charge, the RICO conspiracy charge against petitioners would not be barred, because the non-RICO and RICO conspiracies constituted separate offenses under the totality of the circumstances test traditionally employed by the courts to determine whether two conspiracies are the same for double jeopardy purposes. See, *e.g.*, *United States* v. *Ruggiero*, 754 F.2d 927, 932 (11th Cir.), cert. denied, 471 U.S. 1127 (1985); *United States* v. *MacDougall*, 790 F.2d 1135, 1144 (4th Cir. 1986); *United States* v.

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[13] Romano argues (Pet. 21-25) that even if successive prosecutions for non-RICO conspiracy and RICO conspiracy are permissible when the defendant was convicted for the non-RICO conspiracy, they are not permissible when the non-RICO conspiracy charge resulted in an acquittal. As illustrated by the district court's action in barring the government from introducing evidence of Gambino's participation in the 1980 importation scheme to prove Count 1, when the first prosecution results in acquittal the defendant is protected against future prosecutions under the doctrine of collateral estoppel. Romano does not claim in the petition that the doctrine of collateral estoppel would bar the present prosecution.

Marable, 578 F.2d 151, 154 (5th Cir. 1978). Pursuant to that test, the factors to be considered are the time periods of the conspiracies; the places where the pertinent events occurred; the identity of the coconspirators; the statutory offenses that were the objects of the conspiracies; and the overt acts committed in furtherance of the conspiracies. See *Marable*, 578 F.2d at 154.

Here, with respect to Gambino, although the eight-month time frame of the 1980 conspiracy was contained within the 20-year time frame of the RICO conspiracy, the RICO conspiracy commenced almost ten years before the beginning of the 1980 conspiracy and continued for almost ten years after the 1980 conspiracy terminated. Of the 23 predicate acts alleged against Gambino in the RICO count, 20 postdated Gambino's 1981 acquittal. Apart from Gambino, only one of the 15 RICO defendants also participated in the 1980 conspiracy. Only two of the predicate acts charged in the RICO count—the Count 1 and 2 conspiracies—related to the earlier conspiracy, and of the 41 overt acts charged against Gambino in Counts 1 and 2, only two pertained to the 1980 importation scheme. Finally, the earlier indictment charged a single, discrete scheme to import heroin, while the RICO indictment charged a broad conspiracy to violate the substantive provision of the RICO statute by committing numerous drug offenses, bribery, extortion, gambling, murder, and obstruction of justice. On this record, there can be no doubt that the two conspiracies were not the same.

Likewise, the RICO conspiracy was a separate offense from the drug conspiracy previously charged against Romano. The commencement of the RICO

conspiracy predated the earlier charged conspiracy by 15 years and outlasted it by 14 months. The district court found little overlap between the predicate acts of racketeering charged against Romano and the earlier charged conspiracy, and the RICO count alleges criminal activity by Romano that both predates and postdates the earlier indictment.[14] Pet. App. 50a-51a. Although there is some overlap among the participants in the two conspiracies, the large majority of the named co-defendants and co-conspirators was not the same, and the leadership of the two conspiracies was altogether different. The earlier conspiracy, moreover, involved strictly drug trafficking, while the RICO conspiracy, as indicated above, encompasses widely diverse criminal activity.

c. Quite apart from the differences for double jeopardy purposes between the earlier drug conspiracies and the RICO conspiracy, petitioners' double

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[14] Romano's contention (Pet. 25-26) that the RICO count does not accuse him of committing a single criminal act during the period between the indictments is incorrect. Racketeering Act 34 alleges that Romano engaged in a conspiracy to make extortionate extensions of credit and to use extortionate means to collect extensions of credit that continued up to the date of the instant indictment. An agreement with others to commit crimes is a criminal act itself. To the extent Romano disputes the charge that the loansharking conspiracy continued past the date of the earlier indictment, we note that the allegation in a RICO indictment of acts occurring after the date of a prior indictment for a predicate act "suffices to call for trial without any preliminary demonstration of supporting evidence." *United States* v. *Persico*, 774 F.2d 30, 33 (2d Cir. 1985). If the evidence at trial fails to support the allegation that Romano's participation in the RICO conspiracy continued beyond the date of the first indictment, Romano is not foreclosed from reasserting his double jeopardy claim based on that consideration.

jeopardy claim must fail in light of *Garrett*'s holding that successive prosecutions are permissible where the second-charged offense was not committed until after the earlier indictment. 471 U.S. at 791-792. The RICO conspiracy charged in this case continued for almost ten years past the date of Gambino's earlier indictment and for 14 months past the date of Romano's earlier indictment. Moreover, the indictment alleges that each petitioner personally engaged in racketeering after the return of the earlier indictment against him.

d. *Grady* v. *Corbin*, on which petitioners rely, has no more relevance in the RICO context than in the CCE context. Unlike the simple offenses involved in *Grady*, a RICO offense does not involve a single course of conduct covering a brief time span. Rather, like CCE, it is a compound-complex offense entailing proof of multiple criminal acts committed in furtherance of an ongoing enterprise and occurring over an extended period of time. Accordingly, it is as inappropriate to employ the "same conduct" test in analyzing a RICO prosecution as in analyzing a CCE case. The courts of appeals to address the issue have declined to apply *Grady* in RICO cases. *United States* v. *Gonzalez*, 921 F.2d at 1535-1539; *United States* v. *Link*, 921 F.2d 1523 (11th Cir. 1991); *United States* v. *Esposito*, 912 F.2d 60 (3d Cir. 1990); *United States* v. *Pungitore*, 910 F.2d at 1109-1111. But see *United States* v. *Russo*, 906 F.2d 77 (2d Cir. 1990) (accepting government's concession on facts of that case that *Grady* barred prosecution for acts that had been charged as predicate acts in a prior RICO prosecution).

In any event, as discussed earlier, see pp. 14-15, *supra*, *Grady* recognized an exception to the rule against successive prosecutions for the same conduct

where, as here, the more serious crime is still ongoing at the time of the indictment for the less serious one.[15]

Finally, Gambino's *Grady* argument is meritless because *Grady* bars a prosecution only when evidence of previously prosecuted conduct would "establish an essential element" of the offense charged in the later prosecution, 110 S. Ct. at 2087, and in this case proof of the 1980 importation could hardly be said to "establish" any such element. See p. 16, *supra.*

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[15] *United States* v. *Calderone, supra,* and *United States* v. *Russo, supra,* do not advance petitioners' attack on the RICO conspiracy count for the same reasons that they fail to advance Gambino's attack on the CCE count. See note 12, *supra.* And the pending petition in *United States* v. *Felix, supra,* is no more pertinent to petitioners' RICO challenge than to Gambino's CCE challenge. See note 12, *supra.*

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